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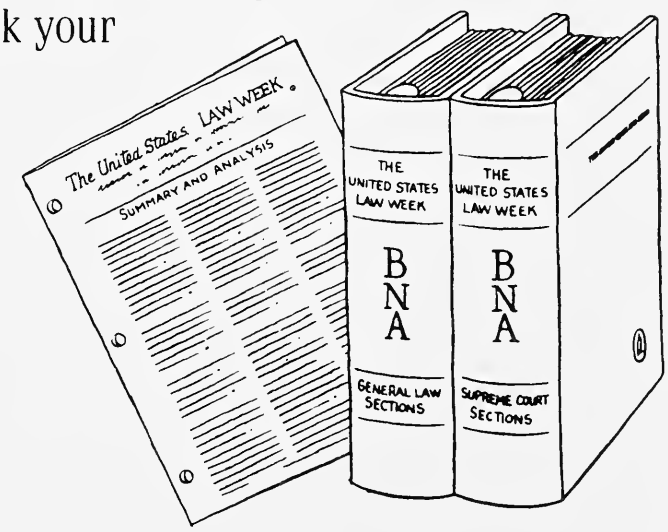

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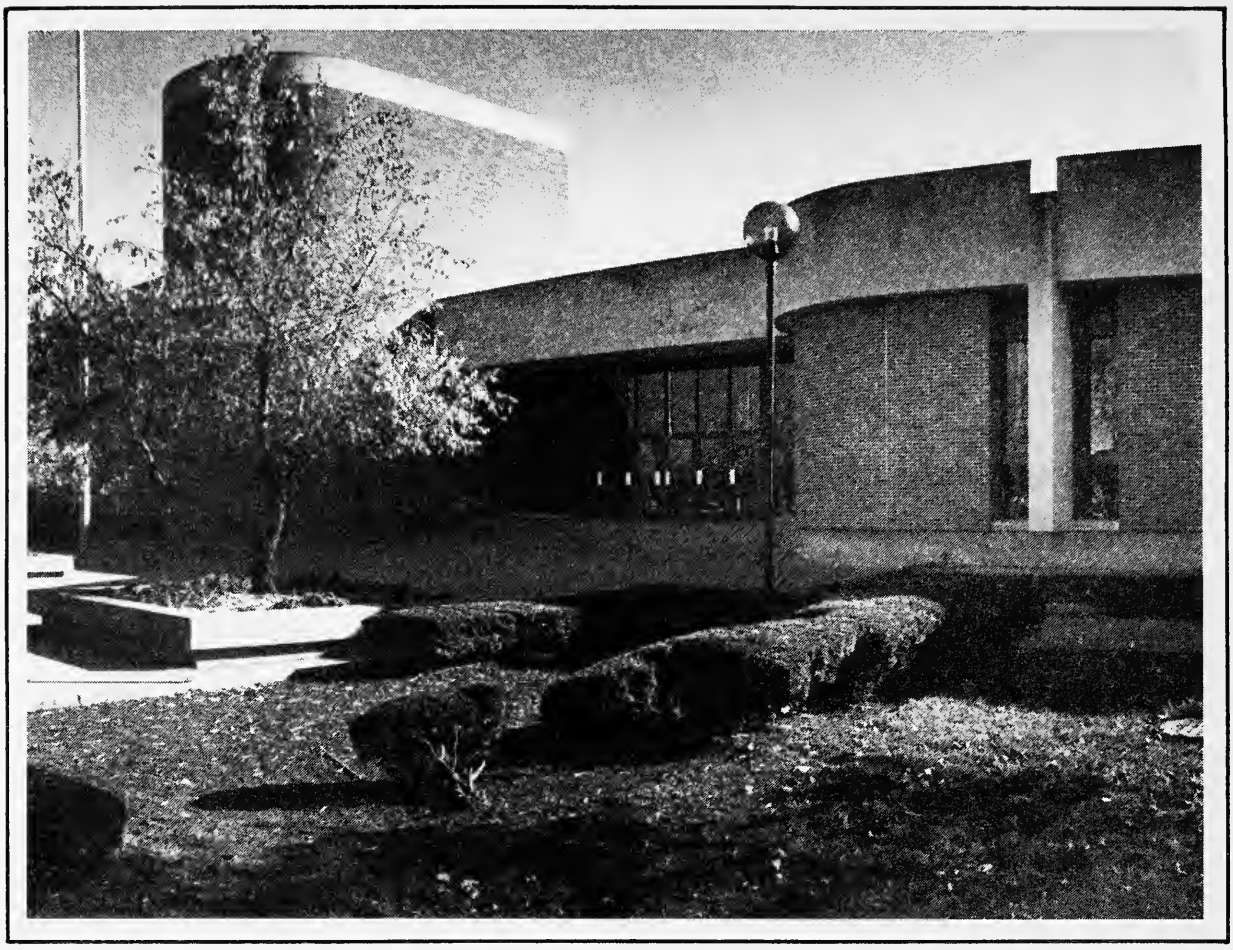

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ARTICLES

Corrective Justice and the Torts Process

SUSAN RANDALL*

INTRODUCTION

Instrumental accounts of tort law[1] demonstrate its weaknesses as a system of compensation and deterrence.[2] Actual and proposed reforms[3]

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* Assistant Professor of Law, University of Alabama; J.D. Columbia University. My thanks to Dean Nat Hansford and the University of Alabama Law School Foundation for their generous support and to Pam Bucy, Bryan Fair, Wythe Holt, and especially Ken Randall for their valuable comments.

1. Instrumentalist critiques of law assess legal rules and practices based on their capacity to implement certain goals. An instrumental conception of tort law, for example, views the compensation of victims and/or the prevention of future accidents as central. In contrast, corrective justice theory posits a moral foundation of and rationale for tort law.

2. The economic analysis of tort law focuses on the use of tort law as a mechanism for accident prevention. According to this approach, the possibility of damage awards acts as an incentive for business and individuals to adopt cost-effective measures either to control or to eliminate accidents. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); *Symposium on the Economics of Liability*, 5 J. ECON. PERSP. 3 (1991). Other criticisms of tort law focus on the compensation of accident victims as well as accident prevention, but the thrust of the argument is that government regulation will most effectively prevent accidents. Similarly, many maintain that a legislatively-imposed and implemented system of social insurance will most effectively compensate those who are injured by accidents. *See generally* STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989) [hereinafter SUGARMAN, PERSONAL INJURY LAW]; Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990) [hereinafter Abel, *Critique*]; Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987) [hereinafter Abel, *Tort Crisis*]; Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985) [hereinafter Sugarman, *Tort Law*].

3. In the late 1980s, almost every state enacted tort reform legislation. *See* Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and The Law Reform Process*, 27 HOUS. L. REV. 207, 220-22 (1990).

and even calls for the abolition of the system as it now exists proliferate.[4] Corrective justice stands in direct opposition to instrumental views of tort law, positing a moral foundation of and rationale for the present system of tort law. The corrective justice theorists' insistance that tort law is grounded in the community's moral sensibilities and serves important social functions beyond instrumental concerns[5] requires close attention. If corrective justice theorists are right, the generally admitted fact that tort law falls far short of achieving the goals of compensation and deterrence[6] may be of diminished significance. Moreover, calls for revamping or dismantling the tort system may fail to give adequate consideration to the role of community morality in tort litigation.

Although definitions vary, one may broadly characterize corrective justice as the correction of certain imbalances or losses created by individual action.[7] As conceptualized by corrective justice theorists, the problem is determining *ex ante* which imbalances should be corrected. These theorists have suggested a number of solutions. Richard Epstein suggested (and retreated from the suggestion) that causal responsibility (or strict liability) is the appropriate basis for tort liability grounded in corrective justice.[8] Ernest J. Weinrib argues that corrective justice in tort law is a matter of restoring equality to those impaired by another's wrongful conduct. According to Weinrib, wrongfulness or fault is measured by Kantian moral philosophy.[9] Jules L. Coleman suggests that

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4. *See, e.g.*, SUGARMAN, PERSONAL INJURY LAW, *supra* note 2; Abel, *Critique*, *supra* note 2; Abel, *Tort Crisis*, *supra* note 2; Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1 (1987); Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579 (1987); Sugarman, *Tort Law*, *supra* note 2.

5. *See infra* text accompanying notes 7-11, 25-27, 62-87, 100-08.

6. *See generally* AMERICAN LAW INSTITUTE REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

7. This broad definition is consistent with that used by corrective justice theorists generally, but it fails to capture variations among theories.

8. *See* Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979) [hereinafter Epstein, *Causation and Corrective Justice*]; Richard A. Epstein, *Causation—In Context: An Afterword*, 63 CHI.-KENT L. REV. 653 (1987) [hereinafter Epstein, *Causation in Context*]; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974) [hereinafter Epstein, *Defenses and Subsequent Pleas*]; Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975) [hereinafter Epstein, *Intentional Harms*]; Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979) [hereinafter Epstein, *Nuisance Law*]; Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) [hereinafter Epstein, *Strict Liability*].

9. Ernest J. Weinrib has written brilliantly and extensively on issues of legal

corrective justice grounds tort liability in instances of wrongful conduct, which may consist of rights invasions (wrongs) or conduct involving fault (wrongdoing).[10] Stephen R. Perry maintains that "outcome responsibility" coupled with fault is the basis for determining which actor or actors should bear losses.[11] In general, these suggestions focus on the

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theory. *See* Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 RATIO JURISPRUDENCE 211 (1989) [hereinafter Weinrib, *Aristotle*]; Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987) [hereinafter Weinrib, *Causation and Wrongdoing*]; Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992) [hereinafter Weinrib, *Corrective Justice*]; Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) [hereinafter Weinrib, *Immanent Rationality*]; Ernest J. Weinrib, *Liberty, Community, and Corrective Justice*, 1 CAN. J.L. & JURISPRUDENCE 3 (1988) [hereinafter Weinrib, *Liberty*]; Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445 (1992) [hereinafter Weinrib, *Note on Coleman*]; Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989) [hereinafter Weinrib, *Right and Advantage*]; Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989) [hereinafter, Weinrib, *Special Morality*]; Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983) [hereinafter Weinrib, *Moral Theory*]; Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989) [hereinafter Weinrib, *Understanding Tort Law*].

Weinrib's analysis of tort law and corrective justice is a building block in an extremely complicated argument for the internal rationality and coherence of law. Although I believe that this particular building block is central to Weinrib's theory of law, I will not explicitly address the implications of my critique of his theory. *See infra* text accompanying notes 72-75, 82-93, for that theory. For an extended critique of Weinrib's larger claim for the internal coherence of law, see Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 631-64 (1992).

10. *See* JULES L. COLEMAN, RISKS AND WRONGS (1992) [hereinafter COLEMAN, RISKS AND WRONGS]; Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982) [hereinafter Coleman, *Wrongful Gain*]; Jules L. Coleman, *Justice and the Argument for No-Fault*, 3 SOC. THEORY & PRAC. 161 (1975); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992) [hereinafter Coleman, *Mixed Conception*]; Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits (Part I)*, 1 LAW & PHIL. 371 (1982); Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits (Part II)*, 2 LAW & PHIL. 5 (1983) [hereinafter Coleman, *Moral Theories II*]; Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976) [hereinafter Coleman, *Strict Liability*]; Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473 (1974); Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451 (1987); Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988); Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992) [hereinafter Coleman, *Demands*].

11. *See* Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381 (1992) [hereinafter Perry, *Comment*]; Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURISPRUDENCE 147 (1987) [hereinafter Perry, *Strict Liability*]; Stephen R. Perry, *The Mixed Conception of Corrective Justice*, 15 HARV. J.L. & PUB. POL'Y 917 (1992) [hereinafter Perry, *Mixed Conception*]; Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992) [hereinafter Perry, *Moral Foundations*].

substantive morality of tort law rules; all of them are mistaken in the narrowness of their focus. Contrary to the descriptive claims of corrective justice theorists, tort law principles often fail to produce substantively moral outcomes, and many tort law principles do not conform to broadly accepted notions of morality.[12] Corrective justice, as currently conceptualized, does not provide a compelling moral counterargument to instrumental critiques of tort law.

This Article advances an expanded theory of corrective justice which accepts the importance of community morality, but provides a distinct moral rationale for tort law. The focus of corrective justice theorists on substantive principles as animating corrective justice is reasonable, but radically incomplete. I suggest that the means by which imbalances are corrected is a crucial, but generally neglected element of corrective justice. Under this view, corrective justice is a matter of tort law processes engendered by highly flexible principles and rules, rather than merely a matter of identifying a particular formal element like causation or fault which calls corrective justice into play. One may justify modern tort law as a matter of corrective justice (if at all) because it permits individualized assessments of responsibility through the interplay between its generalized standards and its processes.[13] Those who propose alternative systems to compensate individuals more equitably and efficiently

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12. Corrective justice theorists do not uniformly agree that tort law, as a descriptive matter, is moral. Epstein, for example, proposes a system of tort law in corrective justice which would render tort law coherent and moral. *See infra* text accompanying notes 164-68. Coleman, whose writings are positive rather than normative, concludes that only portions of tort law are morally based. *See infra* text accompanying notes 94-96. However, corrective justice theory is fairly described as being based in morality. I will assess the corrective justice theorists' arguments that both tort law generally and problem areas of tort law specifically satisfy moral constraints. *See infra* part I.

13. Some participants in the corrective justice debate have recognized the importance of the torts process. *See generally* Catherine Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990); Steven D. Smith, *The Critics and the 'Crisis': A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765 (1987). Corrective justice as pragmatism differs from corrective justice as process in that pragmatists deny the substantive content of tort law standards. They maintain that the system is based upon intuitive, subjective deliberation. Glen O. Robinson and Kenneth S. Abraham have also recently focused on the tort process rather than on the particular substantive rules of tort law. Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481 (1992). They conclude that corrective justice permits, and may require, collective adjudication of mass tort claims. *Id.* at 517-19.

More general contributions to the literature on process include James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982). The concept of a morality of procedure relies upon the seminal work of Lon Fuller. *See* LON L. FULLER, THE MORALITY OF LAW (1964).

than the present tort system,[14] or incremental reforms which place limitations on the functioning of the present system,[15] must factor into the calculus the moral value to the community of the processes of tort law. Specifically, they must consider the process of tort law as a means of establishing or affirming a normative order and as a means of implementing a community sense of justice. Those who advance corrective justice as a counter to proposals for the reform or abolition of the existing system must acknowledge weaknesses in the formal substantive morality of tort law. Further, they must recognize that process—the right to tell one's story—is an additional, and perhaps the primary component in the morality of tort law.[16]

A recognition of corrective justice as process-based explains the apparently contradictory conclusions of corrective justice theorists concerning what is and what is not a matter of corrective justice in tort law.[17] Corrective justice commentary tends to be highly abstract; I will focus on concrete examinations of the objective standard of the reasonable person in negligence, as compared to general strict liability. In particular, I will focus on the work of the following prominent corrective justice theorists: Ernest J. Weinrib,[18] Jules L. Coleman,[19] and Stephen R. Perry.[20] Each argues that wrongdoing or fault (or in Perry's case, "outcome responsibility" coupled with "faulty" or "fault-like" conduct)[21] provides the normative rationale for tort law. Each characterizes strict liability as inconsistent with corrective justice.[22] Nevertheless, each accepts and

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14. These include, for example, legislatively-adopted no-fault compensation schemes that provide compensation for any injury or, alternatively, that designate certain events as compensable.

15. These include, for example, caps on nonpecuniary damage awards.

16. The increasing use of stories in legal scholarship reflects the importance of contextualization in the legal process. *See infra* text accompanying notes 141-42.

17. The focus of much corrective justice theory has been negligence. Accordingly, my analysis will address the morality of negligence. I will not specifically address issues raised by intentional, reckless, or grossly negligent behavior.

18. *See infra* part I.B.1.

19. *See infra* part I.B.2.

20. *See infra* part I.B.3.

21. Perry, *Comment*, *supra* note 11, at 395-96; Perry, *Moral Foundations*, *supra* note 11, at 507-12.

22. Coleman, *Demands*, *supra* note 10, at 354-57; Perry, *Strict Liability*, *supra* note 11; Weinrib, *Special Morality*, *supra* note 9, at 411; Weinrib, *Moral Theory*, *supra* note 9, at 58-62. It is occasionally difficult to determine whether the corrective justice theorists dealt with here object on moral grounds to currently used forms of strict liability, or to theoretical, causally based strict liability, or to both; I will assume that they generally find both forms immoral.

Coleman's position on strict liability is not entirely clear. He retains his position that strict victim liability in tort (in which a faultless victim bears the losses occasioned by

attempts to defend some instances of non-fault liability in tort as matters of corrective justice. Specifically, each accepts as consistent with corrective justice what is essentially strict liability based on an incompetent actor's nonconformance to the standard of the reasonable person in negligence.[23] Neither strict liability nor liability of incompetent actors under the objective standard involves fault. Thus, something other than fault appears to be central to these notions of corrective justice. I suggest that the operative distinction between these two forms of liability, and a central concern of corrective justice, is the process accorded with each. Utilizing strict liability, based upon causal responsibility,[24] preempts thorough, fact-sensitive adjudication. *Requiring* courts to impose liability based solely upon a defendant's causation of harm is contrary to notions of procedural fairness. In contrast, *permitting* courts to impose liability absent fault at the conclusion of an individualized, fact-sensitive inquiry satisfies concerns about the justice of such liability.

Part I will address current conceptions of corrective justice, focussing on the central claim that morality, typically in the form of a requirement of fault, underlies the tort system. I will identify problems with general claims for the morality of tort law, as well as problems with specific assertions by Jules L. Coleman, Ernest J. Weinrib, and Stephen R. Perry that the objective standard of the reasonable person is moral. Part II will advance and defend an expanded conception of corrective justice, which includes process concerns. I will argue that recognition of the importance of process in tort law explains the corrective justice theorists' acceptance of the objective standard of the reasonable person

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the actions of a faultless injurer) is central to tort liability. Coleman, *Strict Liability*, *supra* note 10. He maintains that corrective justice forms the basis of liability in cases of necessity *absent* fault. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 292-96. He also maintains that fault is central to tort law and its morality and that corrective justice is the principle of justice which grounds the fault rule. *Id.* at 285. These conclusions are at least facially inconsistent.

In general, the terms strict liability and negligence are unsatisfactory indicators of the existence of fault. Fault in negligence often involves no moral culpability and very little beyond the assignment of causal responsibility. *See infra* part I.A.. Strict liability as it is currently imposed is not "strict." Liability for ultrahazardous activities and products liability shares much with negligence liability. *See infra* text accompanying notes 157-63. Tort law does not impose strict liability based upon causal responsibility.

The distinction between theoretical causal strict liability and existing forms of strict liability is important to my argument. Where it is important to do so, I will specify whether my argument addresses currently utilized strict liability or theoretical (causal or "true") strict liability.

23. *See infra* parts I.B.1, 2, 3.

24. No current form of strict liability is purely causal. *See supra* note 22. I argue below that the acceptability of current strict liability stems at least in part from its satisfaction of process concerns. *See infra* text accompanying notes 157-63.

as applied to incompetent actors. It also explains their implicit acceptance of other facially immoral tort doctrines as well as tort law's current acceptance of some forms of strict liability. Finally, Part II will attempt a preliminary assessment of this expanded alternative corrective justice rationale for tort law against claims that the tort system is a costly, inefficient, and ineffective method of providing compensation to injured individuals.

I. Corrective Justice and the Substantive (Im?)Morality of Tort Law

Although conceptions of corrective justice vary, there are identifiable commonalities in corrective justice theory. Most importantly, corrective justice theorists posit a moral basis for negligence law. Although this statement involves a simplification, corrective justice theorists defend negligence liability as moral because it is grounded in fault.[25] Strict liability is immoral because it imposes liability in the absence of fault.[26]

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25. I intend to treat the arguments of Ernest J. Weinrib, Jules L. Coleman, and Stephen R. Perry as closely related for purposes of my thesis. I will ignore significant distinctions among the three theorists to focus on what I view to be a central and shared feature of their views of corrective justice and the morality of tort law: the centrality of fault in tort law's claimed morality.

Coleman's theory explicitly identifies fault as essential to tort law's morality and to the operation of corrective justice: "Fault is central both to the institution of tort law and, in my view, to its ultimate moral defensibility. The principle of justice that grounds the fault rule is corrective justice." Coleman, Risks and Wrongs, *supra* note 10, at 285.

Weinrib's theory of corrective justice is part of a much larger project devoted to the internal coherence and rationality of law: "[C]orrective justice is part of a wide complex of ideas that not only includes natural right, but also affirms the significance of formalism, the relevance of abstraction, and the autonomy of juridical thinking." Weinrib, *Corrective Justice*, *supra* note 9, at 425. Corrective justice, according to Weinrib, is a form of justice whose content is based upon the Kantian conception of the equality of individuals. The inequality which justifies and necessitates the operation of corrective justice is the wrongdoing or faulty action of one individual, resulting in injury to another. *See generally infra* part I.B.1.

Perry identifies outcome responsibility and fault as the moral bases for liability in tort law. *See* Perry, *Comment*, *supra* note 11, at 399; Perry, *Moral Foundations*, *supra* note 11, at 496-512. There are significant similarities between Coleman's and Perry's approaches. *See infra* parts I.B.2, I.B.3.

26. *See supra* note 22. Richard Epstein is unique among corrective justice theorists in his defense of strict liability as the appropriate standard in tort law. Epstein's early theory rested entirely on causation as it is defined in ordinary usage, excluding reference to fault or wrongdoing as requisites for tort liability. Epstein, *Defenses and Subsequent Pleas*, *supra* note 8; Epstein, *Intentional Harms*, *supra* note 8; Epstein, *Nuisance Law*, *supra* note 8; Epstein, *Strict Liability*, *supra* note 8. As modified in subsequent work, the theory emphasizes rights invasions as opposed to causation. Epstein, *Causation and Corrective Justice*, *supra* note 8. As others have recognized, strict liability has an intuitive

Relatedly, they argue that the primacy of morality is distinct from purely instrumental concerns.[27]

A difficulty with this conception of corrective justice is the attempt to assess morality retrospectively at the point of the injury-causing action. In negligence law,[28] the conduct which causes injury and results in liability is typically neither moral nor immoral. That is why discussions of fault or responsibility do not explain the bases or purposes of negligence law. The arguments advanced by Weinrib and Coleman, that those who are at fault should bear the losses occasioned by their conduct, fail to account for the true character of negligent acts.[29] Perry's argument, that outcome-responsibility designates the appropriate bearer of loss, fails to distinguish adequately between fault and responsibility and to justify his differentiation of the moral character of negligence and strict liability under a theory of responsibility.[30]

A. The Immorality of Tort Law

There are several underlying problems with arguments that negligence law is substantively moral. First, moral principles and legal rules are functionally dissimilar. In everyday life, apart from the law, moral principles are guides for behavior. People confronted with various possible courses of action often deliberate rationally and refer to moral principles

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moral appeal. As between faultless individuals, it may seem appropriate to place the losses arising from injury on the individual who caused the injury. Both theories have been criticized. *See, e.g.*, Ihzak Englard, *Can Strict Liability Be Generalized?*, 2 OXFORD J. LEGAL STUD. 245 (1982); Perry, *Strict Liability*, *supra* note 11; Richard Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457 (1979); N.E. Simmonds, *Epstein's Theory of Strict Tort Liability*, 51 CAMBRIDGE L.J. 113 (1992). Epstein has since retreated from his earlier positions. *See* Epstein, *Causation in Context*, *supra* note 8.

27. Tort law as a system of corrective justice may be characterized as advancing certain moral values such as individual autonomy. In that sense, it may be instrumental.

28. I do not include intentional torts, recklessness, or gross negligence here. I also exclude strict liability as it is currently utilized. Although strict liability in its present form is similar to negligence, see *supra* note 22, there may be distinctions between strict liability and negligence that require differing treatment. Strict liability, which is typically imposed on enterprises rather than individuals, may result from calculated, considered decisions. Although many characterize negligence liability as involving a risk/benefit analysis, *see, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), negligent behavior by *individuals* is often inadvertent rather than calculated. *See infra* text part I.A. In other words, the risk/benefit analysis in individual negligence occurs *ex post*, focusing on what a reasonable actor should have known or considered. The individual actor in most cases of negligence did not undertake such an assessment prior to the injury-causing conduct. In contrast, cases involving strict liability often involve an actor who is more likely to have made such an assessment.

29. *See infra* parts I.B.1, I.B.2.

30. *See infra* part I.B.3.

in choosing what to do. Some legal rules may function in this way. The criminal law, for example, is intended to influence behavior by imposing sanctions for intentional or reckless action. By contrast, the rules of negligence do not, and are not intended to function as guides for behavior. The central standard in negligence law is reasonableness as determined by a jury. One can hardly say that this standard provides guidance.[31] In everyday life moral principles also provide guides for assessing the morality of completed action. Individuals make moral judgments concerning their own activities as well as those of others. No systemic external consequences typically attach to those judgments.[32] Again, law is very different. Individuals may predict whether a particular action will be found to be negligent, and lawyers may do so quite accurately in some instances. However, legal decisions, and the consequences of those decisions, occur only in the context of the legal system. The structure of the legal system and the processes of adjudication constrain the substantive morality of tort law.

Second, tort law comes into play *only* if an individual's behavior causes injury. Because tort law assesses conduct only if injury occurs, the moral question central to negligence law is who should bear losses caused by negligent action, and not whether that action was faulty or wrongful. The focus on the moral character of injury-causing behavior as wrongful or faulty espoused by Weinrib and Coleman, and, to a lesser extent, Perry,[33] is inherently flawed.[34] If tort law is moral in the

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31. In some instances, negligence may consist of the violation of a legislative enactment or of an administrative regulation. In these instances, the standard of reasonableness derives specific content from the statute, regulation or ordinance at issue. Nevertheless, there is minimal guidance provided for individuals subject to potential tort liability for two reasons. First, a violation is not equivalent to negligence. The statute will apply only if a court first determines that the plaintiff is within a specific class of persons who the statute was designed to protect and suffered an injury of the type the statute was designed to prevent. Second, if these requirements are satisfied, some courts hold that the violation is negligence per se. Others hold that the violation is only evidence of negligence. In these latter jurisdictions, the evidence of a violation is merely one factor in the reasonableness inquiry. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 286, 287, 288, 288A, 288B, 288C (1965).

32. In some cultural or religious communities, such consequences may attach (the Amish practice of shunning, for example).

33. Perry's reliance on fault identifies his theory with those of Coleman and Weinrib. His dual focus on fault *and* outcome responsibility sets his theory apart, suggesting that the occurrence of an injury is, in itself, morally significant, independent of the fault requirement. *See infra* part I.B.3. Coleman's argument that a central concern of corrective justice is the consequences of faulty action may also indicate a dual focus. *See infra* text accompanying notes 110-14. However, Coleman does not develop the point.

34. The approach, which is similar to deontological approaches in ethics, is understandable, particularly in light of its opposition to the instrumentalist conceptions of

sense proposed by corrective justice theorists, its morality is a matter of faulty action *and* injurious consequences.[35] Tort law ignores negligent action which fortuitously does not result in injury. Under tort law principles, liability (and thus moral culpability according to corrective justice theorists) attaches only to negligent actions which cause harm.[36] But surely negligent actions, if such actions involve fault, do so regardless of their consequences. Surely morality is a matter of something more than luck.[37] In tort law, however, as conceptualized by corrective justice theorists, whether an action is moral (and thus legal) or immoral (and thus illegal) does in fact seem to be a matter of luck. The issue of moral luck is a significant problem for corrective justice theorists if it

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law that an economic analysis advances. The dichotomy presented by instrumentalist (economic) and non-instrumentalist (moral) theories is not absolute. One may view tort law as a morally-based, forward-looking institution, one that differs from administrative compensation systems because it seeks to further non-economic human interests as well as to compensate accident victims. *See generally* Ken Kress, *Formalism, Corrective Justice and Tort Law*, 77 IOWA L. REV. i (1992).

35. Not all corrective justice theorists agree. Christopher H. Schroeder's suggestion that tort liability be imposed for risk creation completely severs the connection between conduct and the resulting injury by suggesting the imposition of tort liability for risk creation. In this view, negligent conduct which fortuitously does not cause injury is the moral equivalent of negligent conduct that does. Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990) [hereinafter Schroeder, *Increasing Risks*]. For a critique of Schroeder's work and his response, see Kenneth W. Simons, *Corrective Justice and Liability for Risk Creation: A Comment*, 38 UCLA L. REV. 113 (1990); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990) [hereinafter Schroeder, *Liability for Risks*]. In his earlier work, Jules L. Coleman distinguished between grounds for recovery and modes of recovery in corrective justice. The distinction permitted Coleman to argue that corrective justice could be satisfied by compensating the injured party through any means. This argument minimizes the connection between conduct and injury, and to some extent avoids the problem of moral luck. Coleman, *Moral Theories II*, *supra* note 10. Stephen R. Perry's theory of corrective justice based on fault and outcome responsibility also avoids this problem to some extent. *See infra* part I.B.3.

36. Criminal law provides an instructive analogy. An attempt to commit a crime is itself a crime, punishable in the federal system to the same extent as the completed crime. The conduct itself, regardless of the consequences, is morally and legally culpable. In tort law, the necessity of an injury deflects the focus on conduct.

37. *See, e.g.*, Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 LAW Q. REV. 530 (1988). Paul F. Rothstein, *Causation in Torts, Crimes, and Moral Philosophy: A Reply to Professor Thomson*, 76 GEO. L.J. 151 (1987); Judith Jarvis Thomson, *The Decline of Cause*, 76 GEO. L.J. 137 (1987); Emily Sherwin, *Why Is Corrective Justice Just?*, 15 HARV. J.L. & PUB. POL'Y 839, 847 (1992) ("[I]f the duty to repair a wrongful loss is conceived as a moral duty, grounded in notions of autonomous agency, it should address the choices defendants have made rather than the fortuitous consequences of their choices."). For extended philosophical discussion of these issues, see Thomas Nagel, *Moral Luck*, *in* MORTAL QUESTIONS (1979); Bernard A.O. Williams, *Moral Luck*, *in* MORAL LUCK (1981).

involves, as it seems to, the conclusion that a system of law allegedly grounded in morality concerns itself with only a very limited subset of immoral action (that which results in injury). Corrective justice theorists may address this difficulty by noting that the morality of the system is constrained by the structure and functioning of the system itself: the requirement of an injury is essential to the operation of a bilateral litigation system. However, the recognition of nonmoral instrumental concerns raised by practical systemic requirements (like the requirement of an injury) undercuts a central purpose of corrective justice theory; namely, how to justify tort law on moral as opposed to instrumental grounds.

Third, the identification of the morality of negligence with the requirement of fault presents additional problems for corrective justice theorists. As many have recognized, fault in tort law is an attenuated concept which often bears little relationship to morality.[38] Although notions of individual responsibility dominate tort law, legal responsibility attends countless actions to which morality is indifferent. A momentary lapse of attention, a common mistake, or a simple error of judgment may result in fault-based liability. Do such impositions of liability conform to the moral intuitions of members of society? Should individuals whose "fault" consists primarily in causal responsibility shoulder the burden of what may be enormous losses?[39] Negligence law, despite its purported reliance on fault, shares much in common with strict liability.[40]

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38. RESTATEMENT (SECOND) OF TORTS § 282 (1965), Special Note and comment f, use the term "social fault", apparently to distinguish fault in tort law from fault in the normal sense of the word. *See also* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778-89 (1985), in which Ingber notes: "The trend in tort law over the last 150 years has been to distinguish moral wrongdoing from the legal fault of negligence. . . . Because negligence—legal fault—requires nothing more than momentary inadvertence, the demand for restitutive justice in such cases is influenced less by moral fault than by rule and expectation violation."

39. Tony Honoré would answer this question in the affirmative. Honoré, *supra* note 37. He argues that outcome responsibility rather than fault is the moral basis of tort law. Outcome responsibility involves accepting responsibility for the consequences of one's action or inaction; it is a necessary aspect of personhood. That is, people accept that their actions may have negative consequences and they accept responsibility for those consequences, even though they may be fortuitous. "[T]he fairness of holding someone responsible outside or inside the law depends on their possessing a general capacity for decision and action such that, under the system of bets into which society forces them, they stand over a span of time to win more than they lose." *Id.* at 552. An incompetent actor should not be held liable: "The system is not a fair one to apply to those whose limited capacities make them consistent losers." *Id.* at 552-53.

40. Although "fault" in negligence may involve some level of actual moral culpability, and although strict liability is purportedly imposed in the absence of any finding of fault, in many instances the distinctions between these two bases of tort liability blur. *See infra* text accompanying notes 157-63.

In the bulk of negligence law, it is difficult to maintain that a *moral* concept of fault operates. In many cases, it is difficult to maintain that *any* meaningful concept of fault exists. Corrective justice theorists generally reject strict liability.[41] However, it is certainly arguable that a system of strict liability (one in which the moral focus is causal responsibility for injury and compensation of the injured victim, rather than attribution of what may be an empty concept of fault) may conform more closely to communal moral intuitions.[42] Tort law reflects a basic tension between these two independent, conflicting, and often equally compelling premises: holding individuals liable only for their "blameworthy" conduct (fault-based liability) versus imposing the economic consequences of conduct on the actor who causes harm rather than on the injured victim (liability based on causation).

Relatedly, the character of much negligent conduct supports the contention that fault is not central to tort law's morality. Negligent behavior, by definition, is not deliberate or intentional behavior. Some negligence involves action performed with knowledge that it poses risk to others. However, it is often the product of fatigue, inattention, mistake, thoughtlessness, forgetfulness, or countless other causes—but it is not deliberate;[43] it is not chosen in a morally meaningful way.

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41. *See supra* note 22.

42. The much-debated theories of Richard Epstein articulate the corrective justice rationale for strict liability. *See* Epstein, *Strict Liability*, *supra* note 8; Epstein, *Causation and Corrective Justice*, *supra* note 8; Epstein, *Defenses and Subsequent Pleas*, *supra* note 8. Ernest Weinrib accepts the intuitive appeal of strict liability, especially from an instrumentalist perspective. Weinrib, *Causation*, *supra* note 9, at 416. Coleman takes Epstein's position that even justifiable rights violations support tort liability, and are properly considered matters of corrective justice. Coleman, *Demands*, *supra* note 10, at 354-57, 379.

Corrective justice theorists correctly reject absolute or causally-based strict liability. Despite partially conforming to moral notions on a formal level, strict liability minimizes and perhaps eliminates the torts process. *See infra* text accompanying notes 145-51.

43. A number of early torts scholars reached this conclusion. *See, e.g.*, H. GERALD CHAPIN, HANDBOOK OF THE LAW OF TORTS 499 (1917); W.T.S. STALLYBRASS, SALMOND'S LAW OF TORTS § 7 (9th ed. 1936); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915). Courts also noted that negligence typically arose from inadvertence. *See, e.g.*, *Ex parte* McNeil, 63 So. 992, 993 (Ala. 1913) ("Simple negligence is the inadvertent omission of duty."); Parker v. Penn. Co., 34 N.E. 504 (Ind. 1893) ("Negligence arises from inattention, thoughtlessness, or heedlessness . . . ."); Barrett v. Cleveland C.C. & St. L. Ry., 96 N.E. 490, 492 (Ind. Ct. App. 1911) ("[N]egligence . . . imports inattention, inadvertence and indifference . . ."); Christy v. Butcher, 134 S.W. 1058, 1059 (Mo. Ct. App. 1911) ("[N]egligence . . . is characterized by . . . inadvertence."); Bolin v. Chicago St. P., M & O Ry., 84 N.W. 446, 450 (Wis. 1900) ("[I]nadvertence, in some degree, is the distinguishing characteristic of negligence. . . .").

Modern commentary similarly recognizes that negligence often involves simple unskillfulness, inadvertence, inattention, mere error in judgment, mistake, or mere thoughtlessness. *See* RESTATEMENT (SECOND) OF TORTS § 500, cmt g (1965).

The claim that much negligent behavior lacks moral content, and the subsidiary claim that moral analysis of negligence is inapposite, derive support from arguments typically advanced against economic theories of tort law. Those arguments maintain that the deterrent effect of negligence law is marginal.[44] Deterrence and morality are related; moral consid-

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44. The deterrent effect of any law will depend, *inter alia*, upon the certainty of the applicable legal standard, the potential defendant's knowledge and understanding of that standard, the ability to conform to the standard, and the likelihood that noncompliance will result in legal action against the defendant. Negligence law, particularly as applied to individual behavior, does not meet these criteria because the rules are not specific; individual defendants are not likely to know much about them, and it is impossible for human beings to avoid all inadvertent negligent behavior. The inability of tort law to deter negligence is compounded because the occurrence of an injury following negligent action is fortuitous. Most negligent behavior does *not* result in injury. A United States Department of Transportation study found, for example, that: "[I]n Washington D.C. a 'good' driver *viz.* one without an accident within the preceding five years commits on average, in five minutes of driving, at least nine errors of different kinds." U.S. DEPT. OF TRANS., AUTOMOBILE INSURANCE AND COMPENSATION STUDY 177-78 (1970). Even if negligence results in injury, insurance will likely provide substantial protection for the defendant. Finally, as a practical matter, it seems unlikely that tort liability would provide additional safety incentives beyond those that follow. First, negligent behavior may cause injury to the negligent actor as well as to potential plaintiffs. Second, criminal sanctions may be imposed for negligent behavior. If in fact individuals have an incentive toward safety, that incentive is likely to be regulatory. Individuals generally have some impulses to obey the law, and although the likelihood of being sanctioned for traffic violations may be minimal, it is far more likely than being sued for negligence. The moral questions that arise in this context involve the moral defensibility of noncompliance with legislative enactments and not the morality of the underlying action. There is nothing inherently immoral about driving at a speed of 60 mph, but there may be something immoral about doing so when there is a 40 mph speed limit.

Accident prevention is a central concern in economic analysis of tort law. Critics of law and economics argue that tort law's deterrent effects are marginal at best, particularly as applied to individual behavior. *See, e.g.*, Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1174 (1989); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 346-47 (1990); Sugarman, *supra* note 2, at 564-91. *See also* Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988). Contrary to the predictions of deterrence theory, New Zealand's experience with comprehensive accident compensation system suggests that abolishing tort liability will not necessarily result in more accidents. Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CAL. L. REV. 976 (1985). For an alternative view, see Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 3, 34-45 (1989).

Some claim that motor vehicle and medical malpractice litigation has some deterrent effect. *See generally* Don Dewees and Michael J. Trebilcock, *The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence*, 30 OSGOODE HALL L.J. 57 (1992). With regard to automobile accidents, Trebilcock and Dewees conclude:

> [A]t least some driving patterns that are significantly correlated with accidents, such as speeding or drunk driving, are likely to be responsive to the tort system's

erations may function to deter certain behavior. The general failure of negligence law to deter negligent conduct suggests that such conduct is not the product of considered moral (or economic) choice, but of inadvertence. The bulk of negligence cases against individuals arise from accidents.[45] They are not the result of considered moral choices. This point undercuts both moral and economic analysis of negligence law. Both moral and economic analysis of action presume deliberate choice rather than the inadvertent, accidental conduct which grounds much negligence liability. Economic analysis of tort law, like moral analysis, assumes that defendant rationally chooses among various courses of action. Although this assumption may be warranted in some instances (for example, in cases of design defects in strict products liability), it is unwarranted in many other instances.[46] Moral analysis of negligent

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incentives. This is less clear, though, with respect to momentary acts of inadvertence, where possible tendencies of some individuals to discount low-probability risks may reduce driver responsiveness to the tort system's deterrence signals, at least relative to various penal or regulatory alternatives. *Id.* at 65-66.

The statistical evidence cited by Dewees and Trebilcock, which compares the incidence of accidents under a third party system of liability insurance to a first party no-fault compensation scheme, is inconclusive. Some studies found that the accident rate increased, while others found no correlation between the adoption of no-fault and highway safety. It is similarly unclear whether the increased rate of accidents was attributable to the effects of insurance pricing and regulations or to levels of driver care. Similar difficulties attend the conclusion that the threat of liability may deter medical malpractice. Studies have found that doctors react to the risk of malpractice actions by increased use of specific diagnostic procedures, increased record-keeping, and increased communication to patients concerning treatment and alternatives. It is unclear whether these changes have any positive impact on the rate of medical injury, given that malpractice often results from inadvertence. Schwartz, *supra*, at 347. Some commentators suggest that increased use of various diagnostic procedures may be harmful to patients, thus increasing the injury rate. *E.g.*, Saks, *supra* note 6, at 1284-87.

45. Statistical evidence tends to support this assertion. National Safety Council statistics for 1989 indicate that auto accidents accounted for more than half of the country's accidental deaths and almost twenty percent of disabling injuries. Another thirty-five percent of disabling injuries occurred in the home. Because the Council's figures include categories of deaths and injuries *not* covered by the tort system (notably, work-related accidents), it is clear that a substantial portion of negligence litigation involves accidents that likely resulted from mistake or inadvertence and that do not raise questions of the morality of the injury-causing behavior. *See* NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 2-8 (1990).

Empirical evidence from state courts also demonstrates that the bulk of tort litigation, excluding professional malpractice and products liability, involves automobile accidents (42%) and other types of personal injury (32.9%). Brian Ostrom, David Rottman, & Roger Hanson, *What are Tort Awards Really Like? The Untold Story from the State Courts*, 14 LAW & POL'Y 77, 81 (1992).

46. Schwartz, *supra* note 44, at 346-49. Schwartz notes: "[F]rom the economist's perspective . . . negligence essentially consists of a defendant's deliberate choice to engage

action is similarly anomalous. A retrospective moral assessment of injury-causing action ignores the amoral character of most negligent action.

The claim that much negligent behavior is inadvertent and consequently lacks moral content also derives support from economic theory itself. Although most economic analysis of negligence focuses on "durable" precautions, Mark Grady has concluded, based on analysis of "nondurable" precautions, that "most real-world negligence will center in precautions that people have to remember frequently."[47] His arguments provide support for the insight of scholars who maintain that inadvertent conduct is a primary source of negligence liability.[48] Grady recognizes that negligence liability is routinely imposed for forgetfulness.[49] While economic analysis takes account of the burdens of using a particular precaution, it does not account for compliance costs, which include the inadvertent failure to notice risks or the failure to use precautions. Thus, "most negligence claims will come from someone's failure to use a nondurable precaution because, for precautions of this type, courts exclude a significant part of the actual cost. Because people respond to real costs, they will find it economic to be negligent some of the time."[50] That is, they will continue to forget to use nondurable precautions and will fail to notice when such precautions are warranted.[51]

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in conduct the riskiness of which he distinctly appreciates. . . . [T]his is an assumption of behavioral rationality that most of us non-economists would find somewhat excessive." *Id.* at 346-47. Schwartz argues that individuals have little control over significant categories of negligent behavior. He "invite[s] [his] reader to clarify his own attitudes toward the preventability of negligence" by considering his response to hypothetical offers of premium reductions from an auto insurer if the policy excludes coverage for accidents caused by: (1) the insured's drunk driving; (2) the insured's excessive speeding (at least 25 mph in excess of the limit); (3) the insured's speeding; and (4) the insured's absent-mindedly taking his eyes off the road. *Id.* at 347-48 n.154. Most insureds would take advantage of the first offer. Some would accept the second offer; very few would accept the third; and presumably no one would accept the fourth because inadvertent carelessness is often beyond an individual's control. *See also* Cooter, *supra* note 44, at 1174 ("The present inability of economists to model lapses [in parties' behavior] is a serious weakness in the economic analysis of law.").

47. Grady, *supra* note 44, at 295. Durable precautions are precautions that have "a long service life and . . . [do] not need to be used repetitively." Grady cites the example of a dialysis machine. Nondurable precautions, in contrast, are repetitive, short-term, and easily forgotten. The dialysis machine will "not be effective unless someone properly connects it to the patients, carefully tests the hemodialytic solution, regularly checks the patients' shunts, and so forth." *Id.* at 299.

48. *See supra* note 43 and accompanying text.

49. Grady, *supra* note 44, at 300-10.

50. *Id.* at 310-11.

51. Grady provides empirical evidence for his theory that nondurable precautions account for the bulk of negligence claims. Pilot or personnel error accounts for the great majority of airplane crashes (87.6% in 1984). *Id.* at 328, citing NAT'L TRANSP. SAFETY

Yet another difficulty in asserting the tort system's morality stems from the common disassociation of legal and financial responsibility. As noted above, legal responsibility and moral responsibility are not parallel, and even if legal responsibility is grounded in some measure in a defendant's fault, financial responsibility may not follow. Financial responsibility is often reallocated in ways which may violate traditional notions of morality. A defendant held liable in tort typically does *not* personally compensate the plaintiff. The defendant's insurance company may compensate the plaintiff;[52] an uninvolved third party (or the third party's insurer) may compensate the plaintiff under the theory of vicarious liability. The availability of personal liability insurance may be attributed to the defendant's previously responsible behavior,[53] and, in some cases, the vicariously liable third party bears some measure of actual responsibility. One such example is when an injury occurs as a consequence of negligent supervision. However, the very existence of liability insurance and the utilization of doctrines like vicarious liability unquestionably dilute the moral character of tort law.

Fault-based moral analysis of action cannot explain or justify the allocation of negligence liability. Individuals who are negligent do not make primary moral choices which lead them to be negligent; negligent behavior is often inadvertent. Given the amoral character of many negligent acts, and the virtually imperceptible distinction between negligent actions and actions which ground some forms of strict liability,[54] the question of whether injury-causing action was faulty is meaningless. An assessment of the morality of particular legal rules from the perspective of fault cannot demonstrate the morality of tort law. Furthermore, a legal decision that a particular action was or was not negligent is not a moral decision. Such legal decisions may include a moral component, but the legal system significantly constrains the nature and the extent of that moral component. The moral question important to negligence law centers not on behavior, but on the *consequences* of behavior[55] and the attendant issue of liability. It is not the function of

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Bd., Annual Review of Aircraft Accident Data: U.S. Air Carriers Operations for Calendar Year 1984 (1987). Medical malpractice claims are most numerous in urban centers where the practice of medicine is most sophisticated and there are greater opportunities for omission of nondurable precautions. Grady, *supra* note 44, at 300, 330-31.

52. For an excellent discussion of the issues, see Schwartz, *supra* note 44.

53. Typically, this responsibility is *not* appropriately characterized as morally-derived because most people carry insurance to protect themselves and not to ensure that those they may injure will be protected.

54. *See infra* text accompanying notes 157-63.

55. Jules L. Coleman and Stephen R. Perry both attach importance to the con-

negligence law to prescribe behavior; but rather, given the occurrence of injury, to determine whether tort liability should attach.

In short, the question of whether a particular tort rule is moral may be interesting, but the answer is not particularly illuminating. An answer will bring us no closer to a convincing morally-based defense of the current system of negligence. Negligent actions are generally too trivial to warrant moral analysis. Often neither the character of the action (for example, momentary inattention), nor the context in which it occurs (for example, driving a car) raise moral issues. Rather, the *consequences* of negligent action (and not the action itself) as well as the issue of who should bear the financial burden of such consequences raise moral concerns.

B. The Problem of the Reasonable Person

The difficulties with characterizing tort law as substantively moral are reflected in the moral analysis of individual tort law principles. If "fault" provides the moral basis of tort law, numerous substantive negligence principles suffer from serious moral deficiencies. Among these are: rules which expressly permit non-fault liability (as in necessity cases[56] and the objective application of the reasonable person standard to incompetent actors);[57] rules which expressly permit the imposition of liability for another's conduct (as in vicarious liability);[58] rules which preclude liability in the clear presence of fault (sovereign, parental, and charitable immunities);[59] and rules which require the system to ignore true moral

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sequences of action in their theories of corrective justice. *See supra* note 33. Each does so in an attempt to demonstrate the fault-based character of negligence. *See also* Wright, *supra* note 9, at 697-98 (describing importance of consequences of conduct to Aristotelian corrective justice and locating moral issues in actors' decisions to rectify injuries caused by their conduct).

56. The takings cases seem to accord with moral intuitions. Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910), provides one example. In *Vincent*, the defendant's agent prevented potential destruction of its ship at the cost of some damage to the plaintiff's dock. The court did not view the conduct as faulty. In fact, the court characterized the conduct as prudent, but upheld an award of damages to the plaintiff. *See infra* text accompanying notes 152-53 for further discussion of this case.

57. *See infra* note 67 and accompanying text.

58. Courts most commonly impose vicarious liability against an employer for an employee's negligence in the context of his or her employment, based upon the employer's "control" over the employee and the policy rationale that losses are more appropriately allocated to the enterprise. Tort law also imposes vicarious liability on partners, joint enterprises, automobile owners, and parents. *See generally* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS §§ 70-74 (5th ed. 1984).

59. Immunity doctrines have been abolished by legislation or judicial decision in many jurisdictions. The federal government waived its general immunity to tort liability

fault (the absence of affirmative obligations to assist others in almost all circumstances).[60] These particular examples do not necessarily defeat claims for the underlying substantive morality of tort law. An incomplete identification of particular tort rules or standards with the moral underpinnings of tort law may indicate only that individual rules, for a variety of reasons, do not accurately reflect that morality. Nevertheless, the general and specific charges of immorality and amorality in negligence rules are potentially devastating to corrective justice theories when viewed as a matter of substantive morality.[61] Corrective justice theorists have devoted attention to the problem of the objective standard of negligence,[62] arguing that even apparently immoral applications of the principle are in fact moral.

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with the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2402, 2671 (1988). However, it retains immunity in some instances, notably for intentional torts and for discretionary conduct. The majority of states have waived tort immunity in varying degrees, but a number of states retain significant immunities. KEETON ET AL., *supra* note 58, § 131. Approximately one-half of the states have abrogated parental immunity to some extent. *Id.* § 122. All but a few states have abrogated charitable immunities. *Id.* § 133.

60. There are generally no legal obligations to assist strangers who are in danger. The RESTATEMENT (SECOND) OF TORTS § 314 (1965), states: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *See, e.g.*, Yania v. Bigan, 155 A.2d 343 (Pa. 1959) (no liability where defendant's business visitor drowned in the defendant's presence after jumping into a trench containing eight to ten feet of water). The rule has been the subject of extensive scholarly comment. *See generally* John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867; James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Epstein, *Causation and Corrective Justice*, *supra* note 8, at 490-92; Epstein, *Strict Liability*, *supra* note 8, at 197-204; William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423 (1985); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

61. Some corrective justice theorists posit multiple justifications for tort law. Jules L. Coleman argues that "markets and morals" underlie tort law. Morality or corrective justice is the basis of negligence law and economic considerations underlie strict liability. Coleman, *Demands*, *supra* note 10, at 361 n.12, 379. Stephen R. Perry agrees that the single rationale of corrective justice does not necessarily explain all of tort law. *See* Perry, *Comment*, *supra* note 11, at 381-82.

62. These theorists include: Ernest J. Weinrib, *see infra* part I.B.1.; Jules L. Coleman, *see infra* part I.B.2; and Stephen R. Perry, *see infra* part I.B.3.. All discussed the objective standard at some length. These scholars have *not* advanced the argument that fault is implicit in the imposition of what I have termed non-fault negligence liability. Weinrib, Coleman and Perry address the issue of incompetent actor liability under the unarticulated premise that such liability is a form of strict liability.

Corrective justice theory is largely abstract and does not address specifically those immoralities of tort law enumerated above. Exceptions include specific defenses of the reasonable person standard as applied to incompentent actors by Ernest J. Weinrib,[63] Jules L. Coleman,[64] and Stephen R. Perry.[65] Their attempted moral justification for the standard as applied to incompetent individuals in the context of their rejection of strict liability as immoral[66] presents perplexing problems for these theorists. Ultimately, their apparently contradictory positions suggest that the morality of tort law rests on something other than fault. I suggest that the operative distinction lies in the varying process afforded by negligence and strict liability.

It is well-settled doctrine that individuals who cannot conform to the standard of the reasonable person, as an unfortunate consequence of subnormal intellectual capacity or some other shortcoming, may be held liable for conduct which represents their best efforts.[67] The failure to do what is impossible surely cannot support an imputation of fault, however attenuated. If tort law's morality is based on fault, this doctrine of tort law is unquestionably immoral. Weinrib, Coleman, and Perry have, however, concluded that the standard of the reasonable person is

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63. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 427-29; Weinrib, *Special Morality*, *supra* note 9, at 409-11.

64. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 218-19, 333-35; Coleman, *Demands*, *supra* note 10, at 369-71.

65. Perry, *Moral Foundations*, *supra* note 11, at 496-513.

66. For some criticisms of strict liability on moral grounds, see Coleman, *Demands*, *supra* note 10; Englard, *supra* note 26; Perry, *Strict Liability*, *supra* note 11; Weinrib, *Special Morality*, *supra* note 9; Weinrib, *Moral Theory*, *supra* note 9. Strict liability also has been criticized recently on instrumental grounds. *See generally* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991); James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332 (1991); William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639; Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819 (1992).

67. *See* RESTATEMENT (SECOND) OF TORTS § 283B (1965): "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances." The comments enumerate reasons for the rule, including the difficulties in distinguishing between mental deficiency and individual variations in intellect and temperment; the difficulties of proving mental deficiency; and the possibility that mental deficiency or insanity may be feigned. For discussions of the rule, see generally James W. Ellis, *Tort Responsibility of Mentally Disabled Persons*, 1981 AM. B. FOUND. RES. J. 1079; David Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17 (1981); Comment, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153 (1983).

inherently moral, even in its objective application to incompetent actors. Not surprisingly, their theoretical paths to this shared conclusion diverge. However, they are all unconvincing.

1. Weinrib and Kantian Philosophy.—Ernest Weinrib has written a series of influential articles dealing with the corrective justice foundations of tort law.[68] Corrective justice, in Weinrib's conception, is not a principle of justice, but rather a way to structure legal relationships.[69] As such, corrective justice does not in itself necessitate the choice of fault-based liability as opposed to strict liability, or vice versa.[70] One must make such a choice on substantive grounds. Weinrib finds the proper grounds in Kantian moral philosophy. The moral justification for negligence, including liability under the objective standard, is the maintenance of equality between the parties. Strict liability is immoral because it focuses on the harm to the plaintiff without reference to the defendant's right to act. Any subjectively determined negligence is immoral because it focuses on the defendant's personal characteristics without reference to the plaintiff's harm. In short, the imposition of tort liability is moral if it restores the equality of individuals disrupted by wrongdoing. Conversely, it is immoral if it creates an inequality.

According to Weinrib, negligence liability is moral because an act of negligence or wrongdoing in itself creates an inequality between previously equal individuals. The defendant tortfeasor has engaged in impermissible self-preferential action in disregard of plaintiff's interests. The morality of the negligence standard rests on the requirement of an objective comparison of risks (focusing on the potential harm to plaintiff's property) and costs (focusing on the potential limitations on defendant's actions).[71] Neither parties' interests are preferred over the other's. In Kantian terms, the categorical imperative prohibits a tortfeasor from committing invasions of another's property rights without liability. The tortfeasor could not consistently will that the rule of nonliability become universal law. To do so would render the concept of property impossible because exclusive rights, the hallmarks of property, disappear if the law sanctions the infringements of those rights.[72]

Imposing negligence liability without fault under the objective standard of the reasonable person is similarly moral because this type of

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68. Weinrib, *Causation and Wrongdoing*, *supra* note 9; Weinrib, *Immanent Rationality*, *supra* note 9; Weinrib, *Liberty*, *supra* note 9; Weinrib, *Moral Theory*, *supra* note 9; Weinrib, *Right and Advantage*, *supra* note 9; Weinrib, *Special Morality*, *supra* note 9; Weinrib, *Understanding Tort Law*, *supra* note 9.

69. Weinrib, *Moral Theory*, *supra* note 9, at 37-38.

70. *Id.* at 47.

71. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 428-29.

72. *Id.* at 427.

negligence also violates the parties' equality through the defendant's impermissible self-preference. If tort law permitted a defendant to assert subjectively subnormal capabilities as a defense, the defendant's personal characteristics would set the bounds of the plaintiff's rights. Such a power would violate the categorical imperative because a defendant could not consistently will it to become universal law. Individuals have rights by virtue of their personhood. The very concept of rights is destroyed if a defendant may subjectively determine their existence and extent.[73] The acceptance of a defendant's self-preferential assertion that her conduct is subjectively reasonable would defeat the plaintiff's rightful corrective justice claim. Thus, the court correctly decided the paradigm case of *Vaughan v. Menlove*,[74] in which defendant unsuccessfully asserted that "he had acted bona fide to the best of his judgment . . . [and] ought not to be responsible for the misfortune of not possessing the highest order of intelligence."[75] Indeed, any case in which a defendant lacks the capacity to satisfy the objective standard, but is held liable nonetheless, conforms to Weinrib's version of corrective justice as enriched by Kantian principles. The law of negligence, including its nonfault applications, maintains the principle of party equality.

In contrast to negligence law, strict liability violates the equality of the parties under Weinrib's conception of corrective justice. Strict liability is the mirror image of the subjective standard of negligence in that it sanctions a plaintiff's self-preference rather than a defendant's self-preference.[76] In other words, a plaintiff cannot, based upon subjective facts about herself, consistently will to be universal a law which limits another's actions. As Weinrib explains, strict liability "allows the plaintiff's holdings to determine the limits of the defendant's action [and so] violates the equality of doer and sufferer."[77] Weinrib argues that "holdings" are a subjective fact about the plaintiff in the same way that incapacity is a subjective fact about the defendant. Consequently, a parallel exists between a defendant's self-preference under a standard of subjective negligence and a plaintiff's self-preference under strict liability.

Despite Weinrib's contrary assertions, equality between litigants would also exist under a rule of strict liability or subjective negligence.

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73. *Id.* at 427-29. For similar arguments, see Weinrib, *Understanding Tort Law*, *supra* note 9, at 517-19.

74. 132 Eng. Rep. 490 (Ct. Common Pleas 1837).

75. *Id.* at 492. A rule much like that which the court applied in *Vaughan* extends to subnormally intelligent and insane defendants. *See supra* note 67.

76. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 427-28. For similar arguments, see Weinrib, *Liberty*, *supra* note 9, at 13-16; Weinrib, *Understanding Tort Law*, *supra* note 9, at 519-20.

77. Weinrib, *Special Morality*, *supra* note 9, at 411.

The necessary equality of the parties for purposes of Weinrib's corrective justice remains constant for negligence, subjective negligence, and strict liability. Negligence liability depends upon a balancing of risks and costs. A standard of subjective negligence would operate similarly. The difference is that under the subjective standard, balancing the parties' interests would occur according to a neutrally-adopted rule which permitted consideration of additional factors. Similarly, under a neutrally-adopted rule of strict liability, balancing the parties' competing liberty and property interests would occur *ex ante* rather than *ex post*, without reference to the particular transaction or the parties involved. It is difficult to see how strict liability or subjective negligence violates the parties' equality in a way that the objective standard does not. In each instance, the standard balances the parties' interests and contemplates that one party's interests may take precedence over the other's. The inherent reciprocity of each standard maintains equality; none of the standards involves self-preference.

The claim that a judgment for a defendant under subjective negligence or for a plaintiff under strict liability involves impermissible self-preference ignores the context of the legal system in which courts render such judgments. Weinrib's argument implicitly contemplates the litigants' assertion of power that individual litigants do not, in fact, possess. Weinrib discusses tort rules in terms which suggest that individuals choose and apply the governing legal rules. Weinrib describes the subjective standard this way: "You [the defendant] allow me [the plaintiff] property but you demarcate the border between your holdings and mine; we are both abstractly and equally free as owners, but my freedom is confined to the residue you determine."[78] The rule of strict liability is similar but the power shifts to the other party. Weinrib explains: "I [the plaintiff] recognize your [the defendant's] freedom to act, but I limit the effects of that freedom at the boundaries of what I own. I do not dispute your property owning-status, but my holdings set the line that confines your action and its effects."[79] However, individuals do not have this sort of power because law, judicial or legislative, sets the correlative boundaries of liberty rights in relation to property rights. The boundaries are set prospectively[80] and apply equally to individuals who may become plaintiffs or defendants, but who have no current stake in the choice of rule. Put another way, the analogy to Kantian ethics is imperfect because the legal system itself constrains the choices of litigants, whereas Kantian actors operate in an open moral universe.[81] Weinrib cannot

78. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 427.
79. *Id.* at 428.
80. Judicially-created rules as applied to litigation in progress are an exception.
81. *See supra* part I.A.

reasonably maintain that a defendant, whose conduct a court judged to be legal under an existing neutral rule of subjective negligence, has somehow engaged in impermissible self-preference, or that a plaintiff, whose injury is compensated through judicial application of a rule of strict liability, has unfairly preferred her own interests to those of the defendant. Contrary to Weinrib's assertion, objective negligence, subjective negligence, or strict liability may thus equally reflect the parties' moral equality in any particular transaction which is the subject of corrective justice.

Weinrib attempts to counter these arguments with the assertion that the requisite equality of doer and sufferer, defendant and plaintiff, must be *internal* to the particular transaction.[82] That is, "This equality is not an equality across transactions that would be satisfied by any liability rule so long as it was uniformly applied to all lawsuits. . . . [E]quality must operate within each transaction."[83] Under Weinrib's conception, tort law has an inherent rationality and a "special morality"[84] which treats each instance of doing and suffering as "a discrete unit of normative significance."[85] Because each transaction is a unit, its elements are "internally integrated," and the parties may not be considered independently of each other.[86] Thus, Weinrib maintains:

> Normative considerations that are unilaterally applicable either to the doer or to the sufferer are, therefore, out of place. For instance, the tort relationship is not morally explicable in terms of deterrence, because deterrence can, without loss of any of its justificatory force, focus on the doer even in the absence of any particular sufferer. If deterrence were the justification for tort law, there would be no need for actual damage, nor for compensation to be paid to the plaintiff, nor for plaintiff's injury to be the measure of damages. Similarly, tort law is not understandable as a compensation mechanism, because compensation applies one-sidedly to the sufferer and does not necessarily encompass the doer. If compensation were the justification for tort law, there would be no reason to insist on causation by the defendant or to make compensation take the form of a

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82. There may be an implicit conflict between Weinrib's reference to discrete normative units and his use of Kantian principles which require consideration of the potential aggregate effects of moral rules.

83. Weinrib, *Special Morality*, *supra* note 9, at 409.

84. *See generally id.*

85. *Id.* at 408.

86. *Id.*

> payment by the tortfeasor. The goals of deterrence and causation each fail to embrace both parties.[87]

Because the integration of doer and sufferer is a moral matter, the parties must be equal *within the relationship*. According to Weinrib, that is why tort law utilizes negligence rather than strict liability, and an objective rather than a subjective standard of negligence.

Weinrib's conceptualization of party equality is problematic for several reasons. First, it is unclear *why* equality between the parties must be internal to the transaction. Weinrib assumes rather than supports this key premise in his complex theoretical argument concerning the internal coherence and rationality of law.

Second, Weinrib's theoretical construct is not true to reality.[88] Weinrib strives to demonstrate that subjective facts about one of the parties do not define the relationship between them. Negligence liability achieves this purpose because it requires an objective comparison of the risk of harm and the cost of prevention. Consequently, according to Weinrib, such a comparison precludes an actor's subjective preferences or capacities from dominating what should be a relationship between equals.[89] But Weinrib is wrong. As a descriptive matter, negligence law does, in fact, routinely consider subjective facts about the parties. It may be possible to discount these occurrences as aberrational and unfaithful to the true nature of tort law, but these deviations from Weinrib's vision of tort law are sufficiently extensive and substantial to warrant his consideration. That the objective standard of negligence does in fact take account of certain subjective facts about the defendant is well-established. Although the objective standard disregards mental deficiencies, it is commonplace to find that a defendant's apparent physical disabilities,[90] physical superiority[91] or mental

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87. *Id.* at 408-09.

88. Perhaps Weinrib would maintain that his arguments are normative rather than positive and that existing doctrines which undercut equality are deviations requiring correction. He appears to be arguing, however, that Kantian principles do in fact underlie existing tort law.

89. *See supra* text accompanying notes 71-74.

90. *See* RESTATEMENT (SECOND) OF TORTS § 283C (1965), which states: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." *See, e.g.*, Duvall v. Goldin, 362 N.W.2d 275 (Mich. Ct. App. 1984) (epilepsy); Roberts v. State, 396 So. 2d 566 (La. Ct. App. 1981) (blindness); Otterbeck v. Lamb, 456 P.2d 855 (Nev. 1969) (deafness).

91. RESTATEMENT (SECOND) OF TORTS § 298, cmt. d (1965) ("*Necessity That Actor Employ Competence Available.* The actor must utilize with reasonable attention and caution not only those qualities and facilities which as a reasonable man he is required to have, but also those superior qualities and facilities which he himself has. Thus a superior vision

superiority,[92] or expertise[93] factor into the standard. Tort law also recognizes infancy as a factor to be considered in assessing the reasonableness of conduct.[94] Furthermore, courts routinely and necessarily consider subjective facts about the plaintiff in the calculation of damages[95] and in assessing potential defenses to negligence liability.[96] It is difficult to square these tort doctrines with Weinrib's structure. How can a system of law which rests on the equality of individuals within a particular transaction consistently take account of a plaintiff's thin skull, but not a defendant's thick skull?[97]

Third, in addition to ignoring several tort law doctrines that run counter to his theory, Weinrib apparently limits his arguments to torts involving interference with property rights by focusing on "holdings." Weinrib refers repeatedly to "holdings," suggesting that his analysis is based upon property rights:

> The virtue of the negligence standard is that it regulates the relationship between the *property holders* on the basis of equality. . . . [T]he defendant must implicitly acknowledge not only that the persons he might affect are *property owners*, but that their interests have the same claim to consideration as his own. They cannot insist—as is implied by strict liability—that their *holdings* are more valuable than his freedom.[98]

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may enable the actor, if he pays reasonable attention, to perceive dangers which a man possessing only normal vision would not perceive, or his supernormal physical strength may enable him to avoid dangers which a man of normal strength could not avoid.").

92. RESTATEMENT (SECOND) OF TORTS § 289 (1965) ("The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising . . . (b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has.").

93. Individuals are held to the knowledge, training and skill of an ordinary member of their profession. *See generally* KEETON ET AL., *supra* note 58, § 32.

94. RESTATEMENT (SECOND) OF TORTS § 283A (1965). Children traditionally have been held to a standard of care consistent with their age, intelligence, and experience.

95. Plaintiff's damages arising from a personal injury depend upon a variety of subjective factors, including age; physical and emotional condition; earning capacity; ability to engage in various activities (loss of enjoyment); and relationships with others (loss of consortium).

96. RESTATEMENT (SECOND) OF TORTS § 464 (1965) ("(1) Unless the actor is a child or an insane person, the standard of conduct to which he must conform for his own protection is that of a reasonable man under like circumstances. (2) The standard of conduct to which a child must conform for his own protection is that of a reasonable person of like age, intelligence, and experience under like circumstances.").

97. Again, I maintain that the existence of inconsistent tort doctrines would not defeat normative arguments about the structure of tort law. However, Weinrib clearly makes descriptive claims in his assessment of the objective reasonable person standard.

98. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 428 (emphasis added).

This focus is obviously problematic when applied to personal injury situations. Perhaps Weinrib means to include rights to bodily integrity as property rights, but he has provided no argument for the position. Moreover, the quoted passage suggests otherwise. His argument is extremely limited, failing to take any explicit account of personal injury cases.[99] In such cases, a plaintiff can consistently will to be universal a law which limits or alternatively imposes costs on human activities based solely upon human physical vulnerability. It appears that even a rule of strict liability for physical harm is consistent with Kantian morality.

If, alternatively, Weinrib intends the term "holdings" to include a plaintiff's body and the right to bodily integrity, then it may be difficult to argue that plaintiff's holdings *subjectively* limit a defendant's action. Surely every individual, regardless of age, physical condition, or other characteristic, has an equal right to bodily integrity. Even if we accept Weinrib's premise that one must view the relationship in terms of the particular transaction, the problem persists because a plaintiff and a defendant have equal rights both to bodily integrity and to act within a particular transaction. The exercise of the right to act is not a subjective assertion of a right available only to defendant. The demand for recognition of the right to bodily integrity is not properly considered a subjective demand.

Weinrib fails to demonstrate the morality of non-fault applications of the objective standard of negligence. He also fails to demonstrate the immorality of strict liability. Examination of the Kantian implications of both forms of liability indicates that Weinrib's distinction between the two is invalid, as is the resulting moral alignment of non-fault negligence with negligence rather than with strict liability. If there is some basis for the assertion that objective application of the reasonable person standard to incompetent actors is moral, while strict liability is not, it is not the tenets of Kantian moral philosophy.

2. Coleman and Corrective Justice as Fault.—Jules Coleman has also discussed the centrality of fault in tort law.[100] He writes: "Fault is central

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99. If Weinrib views an individual's interests in the preservation of his or her own bodily integrity as property rights or "holdings," then his account is a full account of tort law. However, the right to bodily integrity cannot reasonably be considered a subjective fact about an individual. Presumably all individuals, regardless of their age, physical condition, and so on, have precisely the same right to bodily integrity.

100. *See generally* Coleman, *Demands*, *supra* note 10. In his most recent works, COLEMAN, RISKS AND WRONGS, *supra* note 10, and Coleman, *Mixed Conception*, *supra* note 10, Coleman has revised his earlier theory of corrective justice. He no longer completely adheres to his unique "annulment thesis" under which corrective justice required simply the annulment of wrongful gains and wrongful losses. A corollary of the thesis was the

both to the institution of tort law and, in my view, to its ultimate moral defensibility. The principle of justice that grounds the fault rule is corrective justice."[101] Coleman's corrective justice concerns itself with wrongful losses arising from wrongful harming or from rights invasions.[102] Coleman ultimately concludes that corrective justice, with its requirement of wrongfulness, grounds two kinds of tort cases: (1) cases of unjustifiable or unreasonable conduct resulting in injury which gives rise to a duty to compensate the victim; and (2) cases of justifiable or reasonable conduct which causes injury and gives rise to a duty to compensate the victim. The first category corresponds generally to fault-based liability, but includes instances of non-fault liability under negligence law. The second category consists of private necessity cases. A third category of cases in which conduct is justified only when the injurer compensates the victim is rooted in economic considerations (markets), and not in corrective justice (morals).[103] This third category corresponds to strict liability.

Coleman maintains that non-fault liability under his first and second categories is consistent with corrective justice. That assertion, however, contradicts his central claim that the morality of tort law, and corrective justice itself, depends upon fault.[104] Under Coleman's account, the concept of corrective justice necessarily relies upon wrongfulness; wrong-

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analytical distinction between wrongful loss and wrongful gain, permitting compensation from any source, and not just from the wrongdoer, consistent with corrective justice. Coleman accepted a modified relational theory of corrective justice under which wrongdoing grounds the victim's claim to compensation, but responsibility—independent of wrongdoing—grounds the defendant's liability. Coleman, *Mixed Conception*, *supra* note 10, at 442-44. Under the annulment view, corrective justice encompasses compensation systems under which losses are paid by someone other than the person responsible for the loss. Under the mixed view of corrective justice, only the person responsible may compensate the victim. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 366. For critiques of Coleman's modified theory, see Perry, *Mixed Conception*, *supra* note 11; Weinrib, *Note on Coleman*, *supra* note 9; Wright, *supra* note 9, at 678-83. I will not address directly Coleman's revisions of his theory here, since they do not affect the portion of his work relevant to my thesis.

101. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 285. For an earlier and somewhat more expansive version of the same arguments, see Coleman, *Demands*, *supra* note 10, at 371.

102. Coleman, *Demands*, *supra* note 10, at 357, 364.

103. Strict liability for ultrahazardous activities illustrates this category of liability.

104. Coleman does not argue that tort law has a unified underlying rationale. *See supra* note 61. The existence of categories of tort liability which ignore fault thus poses no conceptual problems for Coleman. Some of the categories are simply not matters of corrective justice and morality. Coleman does, argue, however, that the objective application of the reasonable person standard absent fault is moral and grounded in corrective justice; my argument addresses this contention.

fulness involves fault, but not necessarily moral blame.[105] Coleman acknowledges that these premises lead to the "rather odd conclusion that fault liability in torts is really a form of liability without 'fault.' This apparent contradiction can be resolved by recalling the distinction between fault in the doing and fault in the doer. Fault liability in torts refers to fault in the doing, not in the doer."[106] According to Coleman's account, corrective justice, including the requirement of wrongfulness, is thus "perfectly compatible"[107] with non-fault liability under the objective standard of negligence. Accordingly, corrective justice requires wrongful conduct, not individual moral culpability, or a "shortcoming in the doing, not in the doer."[108]

This distinction has an intuitive appeal, and it operates in the law to differentiate the attenuated notion of fault used in negligence from fault as a moral concept. The moral standard of culpability is measured against a higher threshold than is legal responsibility. In negligence, legal responsibility typically does not track moral culpability. It is possible to say that conduct is faulty under tort law's low threshold while recognizing that it is without fault when judged against the higher moral standard. Coleman's distinction is thus familiar and appealing, but it does not support the application of the reasonable person standard to incompetent actors. Coleman's repetition of the term "fault" ("fault-in-the-doing" vs. "fault-in-the-doer") suggests that he is distinguishing between act and actor. In reality, he is distinguishing between two senses of the word "fault." The distinction cannot explain the claim that a tort rule imposing liability in the absence of *either* type of fault is moral. Liability under the reasonable person standard requires neither fault in the strong sense of moral culpability nor fault in the weak, attenuated sense generally operative in tort law.[109] Individuals who perform to the best of their subjective capabilities are not at fault in any sense of the word, but they may well be liable in tort. It cannot further Coleman's purpose to confound moral and legal fault in this way.

Further examination of the distinction between faulty conduct and fault in the actor performing the conduct reveals additional problems. What does Coleman mean by "fault-in-the-doing"? What makes conduct faulty? Coleman suggests that the consequences of the conduct are key:[110]

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105. *See infra* text accompanying notes 108-15.

106. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 219.

107. Coleman, *Demands*, *supra* note 10, at 371.

108. *Id.* at 371.

109. Coleman may, of course, intend to argue that deviation from the norm is in itself fault. Such a view robs the concept of fault of all content.

110. But see the intriguing arguments that risk-creation absent consequent harm may implicate corrective justice in Schroeder, *Increasing Risks*, *supra* note 35; and the ensuing comment, Simons, *supra* note 35; Schroeder, *Liability for Risks*, *supra* note 35.

"The central concern of corrective justice is the *consequences* of various sorts of doings, not the character or culpability of the doer."[111] In this passage, Coleman seems to equate fault-in-the-doing with harmful consequences.[112] This equation cannot be correct without involving Coleman in significant inconsistency. If injury, or harmful consequences, is the key to corrective justice, then the principle of corrective justice presumably captures all actions resulting in harmful consequences, including those instances of strict liability which Coleman specifically exempts.[113] If conduct involves fault merely because it results in injury, corrective justice underlies absolute or strict liability. Defining fault-in-the-doing and distinguishing it from fault-in-the-doer is a persistent problem even if one reads the passage as implicitly enumerating jointly necessary, but independently insufficient conditions (fault-in-the-doing and harmful consequences) for the "wrongfulness" which corrective justice requires.[114]

In negligence, "fault" is in fact measured by reference to the reasonable person standard. Even conduct that results in serious adverse consequences may not involve fault as negligence defines it. Imputing fault turns on an examination of the reasonableness of conduct and not on its consequences. For example, fault may consist of an actor's failure to foresee potential risks to plaintiffs or to eliminate or minimize those risks in some way. The question of whether conduct involves fault refers to an actor, to a hypothetical "doer," and ultimately to the particular "doer" at issue. The distinction between fault-in-the-doing and fault-in-the-doer thus collapses to the extent that the legal system measures negligence by the reasonable person standard.

Coleman disregards the interdependence of whether conduct is faulty and whether an actor is at fault (using fault in its attenuated tort law sense). It is unreasonable to say, both linguistically and in the context of negligence law, that there is fault in an action but not in the actor. We cannot assess an individual's fault and retain any measure of the term's normal meaning by looking *only* at action. The notion of fault implies a failing of some sort, and presumes a capacity to act otherwise.

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111. Coleman, *Demands*, *supra* note 10, at 370 (emphasis in original). Although Coleman retains the distinction between faulty conduct and fault in an actor in his subsequent work, RISKS AND WRONGS, *supra* note 10, at 219, he does not reiterate this particular argument there.

112. Stephen Perry also reads it this way. Perry, *Comment*, *supra* note 11, at 399.

113. Coleman, *Demands*, *supra* note 10, at 355-57.

114. It is possible that Coleman's references to consequences here is a recognition of the systemic requirement of an injury. Negligence law is not implicated unless an injury has occurred as a result of conduct. He does not make clear, however, the relationship between conduct, consequences, and fault. For example, Coleman's analysis does not indicate how to distinguish between faultless conduct which causes harm and faulty conduct which causes harm.

Further, because negligence law determines whether there is fault-in-the-doing based upon an assessment of the way reasonable actors would behave, the neat division between act and actor substantially dissolves.[115] To support the distinction between fault-in-the-doing and fault-in-the-doer in the context of non-fault negligence, Coleman must first show that an incompetent actor's conduct is in fact faulty in some meaningful sense. He must also affirmatively demonstrate that tort law distinguishes between action and actor in establishing fault, despite their evident interdependence.

Thus, the distinction between fault-in-the-doing and fault-in-the-doer either contradicts Coleman's conception of corrective justice, implicitly taking in types of liability he explicitly excludes, or becomes untenable because faulty conduct in negligence law necessarily depends upon reference to the actor. As noted above, however, the distinction is intuitively appealing because we recognize that negligent conduct does not necessarily implicate moral culpability. The real distinction here is not between act and actor, but between two senses of the word fault. An action may involve fault in the attenuated sense of the word as utilized in negligence (fault-in-the-doing) without any corresponding moral culpability of the actor (fault-in-the-doer). This distinction is sound. But it cannot justify the imposition of liability for an actor's subjectively optimal conduct. Justifying the tort liability of actors who have conducted themselves to the best of their abilities, but who have nonetheless caused injury entails more than a demonstration that fault in a legal sense and fault in a moral sense are not equivalent. The law's identical treatment of distinct classes of actors—those who fail to meet an attainable standard and those for whom the standard is unattainable—remains to be rationalized under corrective justice.

3. Perry and "Outcome-Responsibility."—Stephen Perry contends that "outcome-responsibility" coupled with fault forms the moral basis of tort law. Outcome-responsibility is a special responsibility for a loss which results from an actor's exercise of his or her capacity to act. Although Perry argues that outcome-responsibility and causation are not equivalent,[116] the concepts are closely related. Perry recognizes that: "The law of torts holds persons to a minimal uniform level of outcome-responsibility, represented doctrinally by the rules on duty of care and proximate cause. . . ."[117] According to Perry, however, causation insufficiently explains outcome-responsibility, which includes "a sense of

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115. See W.B. Yeats for a poetic statement of the same point: "How can we know the dancer from the dance?" *Among School Children*, THE VARIORUM EDITION OF THE POEMS OF W.B. YEATS (eds. Peter Allt & R.K. Alspach, 1940).

116. Perry, *Moral Foundations*, *supra* note 11, at 503.

117. *Id.* at 506.

having made a difference in the world."[118] In itself, outcome-responsibility is not sufficient to justify shifting a loss from the victim to one or more of the group of persons (possibly including the victim) who are outcome-responsible for the loss. Something else is required. Perry identifies that additional element as fault: "[A]mong those persons who have a normatively significant connection with a given loss [are outcome-responsible], it is morally preferable that it be borne by whoever acted faultily in producing it."[119]

In its basic structure, then, Perry's argument differs very little from Coleman's. Outcome-responsibility is a rough equivalent of causation: "[T]he essential characteristic of outcome-responsibility is the fact of having voluntarily performed an action or actions that causally contributed to the outcome in question."[120] Perry attempts to demonstrate that outcome-responsibility is not, however, merely equivalent to causation. Although Perry struggles to distinguish outcome-responsibility and causation, he concedes that proximate causation in tort law, or the requirement that a resulting injury be a reasonably foreseeable consequence of action, captures this "sense of having made a difference in the world." Perry's theory, then, like Coleman's, posits causation and fault (both understood in the sense of the underlying moral principle of outcome-responsibility) as the moral foundation of tort law.

Like Coleman, Perry attempts to justify on moral grounds instances in which an "actor has only exhibited 'fault' in a nonculpable sense,"[121] or in which the objective standard of the reasonable person in negligence is applied to incompetent actors. Like Coleman, Perry is unable to account for liability imposed on the basis of "nonculpable fault." He argues:

> My claim is that in retrospectively evaluating actions that have produced harmful outcomes, we sometimes have a sense that the action should be judged morally faulty *for the purposes of reparation*. . . . [W]hen common knowledge of the relevant causal regularities would lead an agent of average mental capacities to be aware of a sufficiently high level of risk of harm to other persons, taking account of both the probability and seriousness of the outcome, then the action should be treated for purposes

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118. *Id.* at 503. Rules of causation utilized in tort law, I would argue, generally impose liability where actors have this sense and preclude liability where they do not. *See generally id.* at 503-04, where Perry discusses Hart and Honoré's "common sense" conception of causation.

119. *Id.* at 499. *See* Rothstein, *supra* note 37, at 160 (outcomes are important because they give us a statistically reliable basis for the presumption that fault occurred).

120. Perry, *Moral Foundations*, *supra* note 11, at 499.

121. *Id.* at 508.

> of reparation as faulty because it is more appropriate that the agent whose action is being evaluated should bear the loss than that the victim should. . . . What is being suggested is simply that at a certain point outcome-responsibility for the harm a given action has produced should, so far as a publicly acknowledged obligation of reparation is concerned, be treated like culpable fault.[122]

Perry acknowledges but dismisses the circularity of this argument. The evaluation of action depends on the consequences of the action. Fault lies in the outcome of action rather than in the action itself.

Again, as in Coleman's arguments, this conception of responsibility strives to legitimize retrospective moral evaluation of action. Again, the attempt fails. Negligent actors will perhaps feel that their actions have made a difference in the world and will feel a sense of regret only when they cause injuries. To that extent, outcomes are important. Recognizing these human reactions does not explain why an actor whose conduct has *not* been faulty or one who has been "nonculpably at fault" in Perry's terms should be subject to tort liability. An incompetent actor who has breached the standard of the reasonable person and whose action is retrospectively evaluated in light of the outcome may *not* possess the sense of having made a difference in the world, which is the hallmark of outcome-responsibility.

Focusing on outcome reveals a further problem with Perry's theory. He has consistently criticized "general" strict liability. His notion of outcome-responsibility as applied to actors who cannot conform to an objective standard of reasonableness, despite his well-structured arguments, constitutes a particularized notion of strict liability which one may easily generalize. If the decision to impose liability in such cases depends upon "our sense that reparation should occur" based on outcome-responsibility (causation, coupled with a retrospective subjective or objective sense of having made a difference in the world) and culpable or "nonculpable" fault, why is strict liability in general objectionable?

Perry proposes that we assign liability under a theory of "localized distributive justice." Under such a theory, one identifies the group of persons who are outcome-responsible for an injury, and chooses who is or who are liable using comparative fault. If fault in the sense of culpability has occurred, then the responsible actor should pay. If fault in a nonculpable sense exists, then the nonculpably faulty actor should pay. If no fault exists on the part of any actor (including the victim), then presumably Perry would have the victims bear their own losses.

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122. *Id.* at 509-10 (emphasis in original).

But Perry's arguments lead as well to the alternative conclusion that any outcome-responsible actor should pay, *regardless of fault*, particularly where the victim is not outcome-responsible. It is entirely possible that we may have a "sense" that reparation should occur based on outcome-responsibility absent fault. Critics of strict liability have recognized its "intuitive" appeal.[123] In accepting liability based on "nonculpable fault", Perry is perilously close to accepting strict liability.

II. Corrective Justice as Process

Corrective justice theorists have not advanced compelling moral justification for the objective standard of negligence. Others have criticized the standard itself, particularly its application to those who suffer from severe mental incapacity or illness.[124] The rule may persist for practical reasons, including economic efficiency, administrative ease or the inertia of the precedent-based common law process, rather than for normative reasons. The fact remains, however, that the objective standard, even as applied to those with subnormal capacities, is not merely accepted on practical grounds by the legal community. At least some members of the legal community defend it as moral. The flawed defenses mounted by Weinrib, Coleman, and Perry evidence their belief in the standard's morality. This support may not be dispositive on the question of morality, but it counts for something. In questions of morality or justice, it is important to attend to the ultimate claim that the doctrine is moral or just even where the proffered support for it fails. In other words, it is reasonable to take support for the objective standard on moral grounds as preliminary evidence of its morality.

Weinrib, Coleman, and Perry correctly assert that non-fault negligence, and not strict liability, is moral. They have not, however, correctly identified the distinction which accounts for the their conflicting moral assessments of the two standards. The crucial distinction between strict liability and non-fault negligence is the *process* by which liability is adjudicated in each instance. Legal process, not substantive morality, distinguishes non-fault negligence under the objective standard from strict liability. The morality of negligence law lies in the legal process that its flexible standards afford.

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123. *See, e.g.*, Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 416.

124. *See, e.g.*, Paul A. Beke, *The Objective Fault Standard in Weinrib's Theory of Negligence: An Incoherence*, 49 U. Toronto Fac. L. Rev. 262 (1991) (arguing that objective standard unfair to persons of subnormal intelligence); Epstein, *Strict Liability*, *supra* note 8, at 153; Honoré, *supra* note 39, at 553; Richard Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 31 (1972) (concluding that objective standard difficult to square with moral approach to negligence, citing example of insane defendants).

A. The Importance of Process

Recognizing the importance of process to corrective justice is not new. It dates to Aristotle.[125] According to Aristotle, in Book V of The Nichomachean Ethics, corrective justice is a form of justice concerned with voluntary and involuntary interactions[126] between equal individuals. Its aim is the rectification, through adjudication, of wrongful injury inflicted by one individual and suffered by another. Distributive justice, by contrast, is a separate concept, concerned with the appropriate distribution of goods within society.[127] Distributive concerns are irrelevant to corrective justice: "the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it."[128] The injustice lies in the disturbance of the pre-existing equilibrium between the parties, and the judge's function is to restore the equilibrium.[129] Thus, the central features of Aristotle's corrective justice are a bilateral structure involving two parties, an injury to one party caused by the wrongful conduct[130] of the other, the moral equality of the parties for purposes of corrective justice, and the use of adjudication to rectify the wrong.[131]

Significantly, although Aristotle's explanation of corrective justice includes illustrations of the application of substantive principles, one

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125. ARISTOTLE, THE NICHOMACHEAN ETHICS, Bk. V, ch. 4, 8 (David Ross trans., rev. ed. 1980).

126. Aristotle discusses three types of interactions which give rise to injury. These roughly correspond to intentional torts, negligence, and strict liability. Richard Wright maintains that Aristotle's version of corrective justice requires rectification for each of these categories. Wright, *supra* note 9, at 698. This reading is disputed, but corrective justice theorists have extended what they regard as Aristotle's more limited theory to encompass negligent as well as intentional torts. Coleman, *Wrongful Gain*, *supra* note 10, at 436; Perry, *Moral Foundations*, *supra* note 11, at 453, 454. In his discussion of Aristotle, Wright suggests that the immorality involved in unintentional unjust losses arises from the deliberate choice to avoid rectification and not from the original conduct. *See supra* text accompanying note 55.

127. For a recent treatment of the relationship between corrective and distributive justice, see Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992).

128. ARISTOTLE, *supra* note 126, at Bk. V, ch. 4, 8.

129. *Id.*

130. In Aristotle's conception, the wrongfulness of the injury arises from the intentional character of the original conduct or, in the cases of the Aristotelian analogues of negligence and strict liability, from the intentional character of the decision not to compensate. *See supra* note 55.

131. For fuller discussion of the Aristotelian roots of modern corrective justice, see Weinrib, *Aristotle*, *supra* note 9; Weinrib, *Corrective Justice*, *supra* note 9; Wright, *supra* note 9, at 683-702.

may read him as recognizing the importance of process to corrective justice. At the outset of his discussion of corrective justice, Aristotle refers to the judge and the judicial function of restoring to equality imbalances created through the action of individuals. The formal requirement which brings corrective justice into play is inequality. However, once a party has identified an alleged inequality, recourse is to a judge. Aristotle writes: "That is why, when disputes occur, people have recourse to a judge; and to do this to have recourse to justice, because the object of the judge is to be a sort of personified Justice."[132]

The attempt to explicate corrective justice in tort law as a matter of tort law processes and practices stems from the Aristotelian conception.[133] Process considerations are central to corrective justice in the Aristotelian conception, just as they are central to tort litigation today. The very nature of the law applicable to tort cases suggests the primacy of process. The central principle in tort law is the standard of the reasonable person. As compared to specific prescriptions such as "Do not do X, Y, or Z," standards require highly contextualized adjudication.[134] Accordingly, any analysis of the substantive morality of tort law principles may provide at most only partial justification for the system. Process concerns represent the other part of the analysis and it is these concerns which corrective justice theorists have neglected.

Because tort law consists primarily of standards or norms, with its central concept the formally indeterminate standard of the "reasonably prudent person," justice or morality in tort law cannot be a matter of static concepts. Although a broadly conceived concept of fault or responsibility is central to much of tort law, many have magnified and distorted the character of various actions to justify the imposition of "fault"-based liability. The formal element of fault is absent in many accepted applications of tort law principles.[135] Although the proffered moral justifications for these applications fail, the repeated and vigorous attempts at justification may suggest an underlying morality of a different sort. Perhaps many accept the objectively applied standard of reasonableness not because it relies, in many applications, on "fault," but because in all of its applications, it accords with notions of procedural fairness and the belief that individuals should have a forum in which

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132. ARISTOTLE, *supra* note 126, at Bk. V, ch. 4, 8.

133. Whether or not Aristotle intended to demonstrate an integration of process and corrective justice is unclear, but there is at least a plausible ancestral link.

134. *See generally* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 70-95 (1987); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987).

135. *See supra* notes 56-60 and accompanying text.

to resolve their arguments. Under this conception, the process of dispute resolution is the moral focus, not the particulars of applicable legal rules or the actual substantive resolution of a particular dispute. The process of dispute resolution, as a means of creating or affirming society's normative order, is the central purpose of the tort system.[136]

A substantial body of scholarly work in the fields of psychology and sociology supports these conclusions, demonstrating that participants in the legal process assess its justice based largely upon their abilities to control the content of the proceeding, rather than on the outcome of the proceeding (and derivatively, the substantive rules applicable to it). This effect has been replicated in a variety of experimental settings by numerous researchers.[137] In legal settings, disputants routinely prefer adversarial procedures, which permit greater levels of process control, to nonadversarial procedures.[138] In other types of dispute resolution, participants who were permitted to voice opinions and to present information to a decisionmaker perceived the subsequent decisions to be more equitable than did individuals who had not been permitted to participate.[139] These preferences appear to be independent of decision control. In other words, studies indicate that participation in decision-making processes, absent any power over the actual decision, is central to perceptions of the fairness of the decision. When litigants have full opportunity to speak and to be heard, to gather and to present information to the court, both they and observers of the proceedings accept the process as just and fair regardless of the outcome. This insight, if true,[140] suggests some basis for the persistence of non-fault liability under

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136. *See supra* note 13.

137. *See, e.g.*, E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988); John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis (1975); Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. Personality & Soc. Psychol. 108 (1977); E. Allan Lind et al., *Decision Control and Process Control Effects on Procedural Fairness Judgments*, 13 J. Applied Soc. Psychol. 338 (1983); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolutions of Conflicts of Interest*, 39 J. Personality & Soc. Psychol. 643 (1980); Tom R. Tyler, *What is Procedural Justice: Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 Law & Soc. Rev. 103 (1988). *See also* Michael D. Bayles, Procedural Justice: Allocating to Individuals (1990).

138. *See generally supra* note 137. This result obtains even in cross cultural studies, minimizing the concern that correlations between increased perceptions of fairness and process control are the result of cultural factors. Unpublished research by Walker and others indicates that subjects whose own legal system is inquisitorial (thus affording greatly reduced levels of process control) rather than adversarial, prefer adversarial resolution of conflict. Thibaut & Walker, Procedural Justice, *supra* note 137, at 77-80.

139. *See, e.g.*, Folger, *supra* note 137.

140. There are grounds for questioning the results obtained by social scientists

the objective standard of negligence as against the apparently contradictory rejection of strict liability. It also suggests some basis for the broader conclusion that process concerns are central to corrective justice in tort law.

Current trends in legal scholarship indirectly support the conclusions that the morality of tort law lies primarily in the processes engendered by substantive rules rather than by the rules themselves. The torts process recognizes the importance of the litigants' stories in the context of individual adjudication. Likewise, current legal scholarship recognizes the importance of stories in the context of legal theory. A growing body of scholarly literature utilizes narrative as a means to demonstrate the law's exclusion of the perspectives of marginalized individuals and to communicate the urgent necessity of change.[141] A similarly expansive

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studying procedural justice as well as the conclusions drawn from those results. The conclusion that procedural as opposed to substantive justice predominates the litigants' assessment of the fairness of legal proceedings is based upon the results of simulated dispute resolutions using college students as subjects. Typically, the subjects participate in hypothetical dispute resolutions and are subsequently questioned about their perceptions of the proceeding's justice. Numerous objections concerning the research methodology in such simulations may arise, for example: the potential trivialization of the simulated proceeding resulting from its artificiality; the use of a relatively homogeneous experimental group; the likely inability of researchers to simulate complex legal realities, and if they cannot, to transfer conclusions drawn from simpler dispute resolutions to actual judicial processes. However, results have been consistent over numerous and varied experiments. *See generally id.* Anecdotal evidence derived from researchers' observations of and questions to participants in actual proceedings supports the findings as well. Thibaut and Walker tell the story of a woman who was angered by a traffic court decision in her favor because she perceived the process to be unfair. The judge ruled in her favor but did not permit her to explain what had happened. Bayles notes the comments of a woman did not want to contest a divorce action filed by her husband, but wanted to appear "because she wanted to someone to know how she felt about it." *See* Bayles, *supra* note 138, at 131.

A recent RAND Institute for Civil Justice study suggests that the perceived fairness of a claim resolution is not as great where claimants utilize the legal system, as opposed to directly requesting compensation from the injurer or an insurance company. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 137-41 (1991). The dissatisfaction of claimants utilizing the legal system as opposed to other options may reflect: (1) the time and effort involved in making a legal claim; (2) the fact that many claimants utilizing the legal system had unsuccessfully attempted to utilize the other alternatives; and (3) the fact that forty percent of the legal claims were still pending at the time the researchers conducted their interviews. Not surprisingly, claimants cited compensation as the most important reason for pursuing a claim. Significantly, thirty-five percent of the claimants also cited "the chance to have someone else hear my story of what happened" as being "very important" to the decision to pursue a claim. *Id.* at 171.

141. For recent and illuminating uses of narrative in legal scholarship, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L BLACK L.J. 1 (1993); Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1 (1990).

body of scholarly literature analyzes the uses of narrative in legal scholarship.[142] The use of individual experience to substantiate, to discredit, or to reconceptualize scholarly positions, and the recognition of the importance of personal experience in formulating such positions, reflects individualization and contextualization, both of which are central to the process of dispute resolution. All of the literature reflects the importance of individual voice and of context. If one recognizes voice and context as central to legal theory, their centrality to the just adjudication of individual cases cannot be a matter of any dispute.

B. The Objective Standard (and Other Issues) from the Perspective of Process

Recognizing a process-based moral dimension to tort law does not mean that the objective standard of negligence is moral, or that it is as moral as we can reasonably expect in an imperfect world, or even that its non-fault applications are defensible. In fact, I think otherwise.[143] I suggest only that the standard, in both its fault-based and non-fault applications, permits the litigants a level of control over the process sufficient to satisfy concerns about corrective justice as process, despite its questionable morality as a formal rule. Viewing the standard in the broad context of corrective justice as process suggests an explanation for the continuing use, acceptance, and defense of an intuitively unacceptable rule. That litigants have the opportunity to define their claims, and the ability to present those claims with factual specificity and attention to context satisfies a sense of procedural justice in a way that strict liability cannot.[144]

A comparison of non-fault negligence liability under the objective standard of reasonableness and strict liability focused on procedural variations illustrates the importance of process. The liability of incompetent actors under the standard of the reasonable person has significant formal and structural affinities with causal strict liability. Each involves liability imposed in the absence of fault. However, from the perspective of process, the affinities disappear. In non-fault negligence, the litigants

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142. *See generally* Kathyrn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

143. The application of the standard to many incompetent defendants is indefensible. To the extent that an insane defendant, for example, could *not* have conformed to the standard, it should not be applied. *See supra* note 124.

144. The role of the jury in this process has been explored by Catherine Wells, *supra* note 13.

have some significant measure of process control, whereas in strict liability they do not. Defendants subject to potential non-fault liability under the reasonable person standard have an opportunity to place the facts fully before the jury, to impart content to the applicable standard of reasonableness, and to convince the jury where the bounds of reasonableness lie—just as they do in negligence cases generally. The standard of reasonableness provides a basis for the situated, contextualized examination which strict liability for causation of harm preempts. Defendants subject to liability based upon causation would not have meaningful opportunities to introduce factual inquiries because the substantive rule would preclude factual inquiry beyond that regarding causation.[145] Thus, an individualized assessment of defendant's conduct under a standard of absolute liability is impossible.

An examination of the seminal case of *Vaughan v. Menlove*[146] provides further illustration of the process-based distinction between nonfault negligence and strict liability. In *Vaughan*, the defendant built a hay rick near the boundary of his property. The hay rick later caught fire due to "spontaneous heating"[147] of the hay. The fire spread and burned plaintiff's cottages located on the adjacent land. The defendant argued that he acted to the best of his judgment and "ought not to be responsible for the misfortune of not possessing the highest order of intelligence."[148] The court rejected the use of the subjective standard advocated by the defendant, relying instead on the objective standard of reasonable prudence. If the defendant was in fact incapable of understanding the dangers presented by his conduct, then he was held liable without fault. However, the court held him liable *only* after a jury trial at which his

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145. Causal determinations in tort cases may pose great difficulties. Numerous factors produce the harms which give rise to tort actions. Consequently, identifying *the* cause for legal purposes may be complex. The problem of attributing causal responsibility is magnified in cases of probabilistic harms. Causal attribution in some toxic exposure cases may be impossible, given the "background" risks of developing disease. Plaintiffs whose exposure to defendant's toxins may have caused their cancer, face what may be the insurmountable problem of proving that they would not have developed cancer absent the exposure. In cases of common accidents, however, causation is a fairly simple determination, and strict liability for causation of harm would eliminate a great deal of litigation. Although a system of strict liability would sanction many more cases, presumably fewer would actually be brought. Because rules of causation independently permit relatively certain determination of liability, many cases could be settled or adjudicated with minimal procedures. Negligence, in contrast, necessitates litigation because it requires inquiries into the reasonableness of both the plaintiff's and the defendant's actions, in addition to causal determinations. For discussions of causation issues in tort law, see generally Symposium, *Causation in the Law of Torts*, 63 CHI.-KENT L. REV. 397 (1987).

146. 132 Eng. Rep. 490 (1837).

147. *Id.* at 491.

148. *Id.*

counsel had the opportunity to give content to the applicable standard, to explore whether a reasonably prudent person would have foreseen any risk, and to convince the jury that the defendant in fact conformed to the standard of reasonable prudence.

Although the court instructs the jury to consider a hypothetical reasonable person, jurors are quite likely to do so with reference to the characteristics and limitations of the defendant before them. Clarence Morris argues that the objectivity of the standard is "more academic than real":

> [T]he defendant is usually in the trial court and testifies before the jury. Inevitably much about defendant comes out in the trial—the defendant's identification as a witness, testimony about the activity in which defendant injured someone, and defendant's appearance and actions in the courtroom all throw light on his or her discrete personality. The defendant's impact as a unique person often affects jury deliberations. A jury charged to take circumstances into account seldom compares the defendant to an abstract reasonably prudent person having none of the defendant's attributes.[149]

If strict liability based upon a defendant's causation of harm had been the applicable rule, the destruction of plaintiff's property as a result of defendant's conduct would have been sufficient for liability. The parties likely would have settled the *Vaughan* case; had they litigated it would not have presented a jury question.[150]

An examination of current tort law doctrines supports the conclusion that process is central to the morality of tort law. For example, courts impose liability without fault in necessity cases.[151] In *Vincent v. Lake Erie Transport Co.*,[152] the defendant's agent tied a ship to the plaintiff's dock during a dangerous storm, preventing potential destruction of the

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149. CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 51-52 (2d ed. 1980).

150. It may happen, of course, that courts eliminate the jury's function by determining as a matter of law that defendant has not behaved with reasonable prudence. However, even in those cases, the court affords the defendant consideration of the circumstances beyond what would occur under a standard of absolute liability.

151. Jules Coleman argues that such liability is consistent with corrective justice; although the actions involved in necessity cases are justifiable, they are nonetheless wrongful for purposes of corrective justice. Coleman, *Demands*, *supra* note 10 at 355. Coleman's assessment runs contrary to normal conceptions of wrongfulness; in cases of necessity, the community agrees that the actor's choice to take another's private property was the correct one. Stephen Perry suggests that the wrongfulness of the conduct arises from its intentional nature, Perry, *Mixed Conception*, *supra* note 11, at 928-29.

152. 124 N.W. 221 (Minn. 1910).

ship at the cost of some damage to the dock. Despite the court's characterization of the defendant's conduct as reasonable and prudent, it upheld an award of damages to the plaintiff. Liability clearly was not fault-based. The defendant's action was based upon a determination that his compelling needs justified the possible damage to another's interests. To some extent, the intentional character of a defendant's conduct distinguishes necessity cases from both negligence and strict liability. However, process considerations are also central. If true strict liability were the rule, the harm to the dock combined with a showing that the defendant caused the harm would require a judgment for the plaintiff. But under the present rule, the court must make a number of factual inquiries, including the reasonableness of the defendant's assessments. In the *Vincent* case, these assessments would include the potential damages to the ship had the defendant's agent cut it loose and the potential damages to the dock if the ship remained moored there.[153] The acceptance of the doctrine of necessity supports a contention that process engendered by substantive rules, and not the element of fault, underlies corrective justice.

The current utilization of strict liability in tort also supports a view of tort law's morality as process-based. Corrective justice theorists characterize strict liability as immoral.[154] Others, however, have argued that strict liability approximates fault-based liability.[155] They argue that the requirement of a defect in strict products liability, or the conduct of extremely hazardous activities, is analogous to fault in negligence. However, the "fault" required by these doctrines is extremely attenuated, just as it is in negligence.[156] A view of corrective justice (or tort law's morality) which encompasses procedural concerns provides a more complete rationale for the legal community's acceptance of current strict liability categories.

Elements of strict liability for ultrahazardous activities under the RESTATEMENT (SECOND) OF TORTS §§ 519[157] and 520[158] provide an avenue

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153. In necessity cases, the result may be the same regardless of the rule of liability applied. If the defendant incorrectly and unreasonably calculated the relative potential risks, negligence will lie. If the defendant correctly assessed the risks, the rule of necessity requires compensation. If strict liability applies, the court automatically will hold the defendant liable. The intentional character of a defendant's action accounts for this anomaly. *See* Perry, *Mixed Conception*, *supra* note 11, at 928-29.

154. *See supra* note 22.

155. *See, e.g.*, Frederick Davis, *Strict Liability or Liability Based on Fault? Another Look*, 10 U. DAYTON L. REV. 5, 22-30 (1984); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 970-72 (1981). Jules Coleman also notes that strict liability and negligence are conceptually linked. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 258, 367-68.

156. *See supra* part I.A.

157. RESTATEMENT (SECOND) OF TORTS § 519 (1965) provides:

for factual inquiry, and thus for the expanded process which renders it morally acceptable.[159] Section 520 involves a case-by-case balancing of factors remarkably similar to that undertaken in negligence cases.[160] In assessing liability for injuries resulting from a particular activity, the court must examine the activity in depth, balancing the degree and risk of harm occasioned by the activity, the difficulty of eliminating the risk, and the value of the activity to the community. The court must also consider whether the activity is a matter of common usage and whether it is appropriate to the place at which it occurs. It is apparent that this involves a measure of liability similar to that in negligence cases.[161]

Similarly, strict liability for injuries caused by products is limited to defective products. Whether the product was in fact defective will involve factual investigation and argument. Issues of causation and the potential assertion of various defenses necessarily require further factual inquiry. RESTATEMENT (SECOND) OF TORTS § 402A, like § 520 discussed above, incorporates a negligence standard: "One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property. . . ."[162] Under this rule, courts balance numerous factors to determine whether a product design is unreasonably dangerous.[163] Again, the similarities to liability under traditional negligence concepts are undeniable.

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(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

158. RESTATEMENT (SECOND) OF TORTS § 520 (1965) provides:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and,

(f) extent to which its value to the community is outweighed by its dangerous attributes.

159. Many have argued that strict liability in its current usages is actually fault-based liability. *See supra* note 155.

160. *See supra* note 158.

161. *See, e.g.*, Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206 (Alaska 1978).

162. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added).

163. *See, e.g.*, Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410 (Colo. 1986),

On a more abstract level, the progression of Richard Epstein's theory of strict liability and the critical response to it also demonstrate the centrality of process to the tort system. In his early work, Epstein advocated liability based on causation of harm regardless of the defendant's intent or the reasonableness of his or her conduct.[164] He proposed a system of prima facie liability based on the causal paradigms of force, fright, compulsion, and risk creation. He developed the theory by introducing certain subsequent pleas and defenses which would limit liability by "reduc[ing] the gap between notions of causation and those of responsibility."[165]

Criticism of Epstein's causal theory of strict liability centered around the assertion that it implicitly relied upon fault.[166] Epstein's critics suggested that the very identification of the causal paradigms involved policy decisions which depend upon the resolution of moral issues. Utilizing certain defenses and subsequent pleas similarly suggests that something

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in which the court relied on the following factors in determining whether a product design was unreasonably dangerous under § 402A:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
> (2) The safety aspects of the product—the likelihood that it will cause injury and the probable seriousness of the injury.
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 414.

164. Epstein later developed an alternative theory of strict liability designed to meet objections to the causation model. In this more complex version of his theory, Epstein argues that causation coupled with the violation of property rights, including an individual's proprietary claim to his or her own body, renders a defendant strictly liable, subject to certain subsequent pleas and defenses. Rules of liability and property rights are correlative: "By definition, every liability rule is tied to a correlative property interest that the law protects." Epstein, *Causation and Corrective Justice*, *supra* note 8, at 500. By injuring or destroying property, a defendant necessarily invades or infringes upon ownership rights to that property. This invasion or infringement requires a remedy under corrective justice. Criticism of Epstein's rights-based theory of strict liability focuses on the conspicuous absence of any supporting theory of rights. *See, e.g.*, Simmonds, *supra* note 26, at 132-37.

165. Epstein, *Defenses and Subsequent Pleas*, *supra* note 8, at 213.

166. Perry, *General Strict Liability*, *supra* note 11; Englard, *supra* note 26, at 251.

other than, or in addition to, causation determines liability. Corrective justice theorists identify that additional factor as fault. The view that Epstein implicitly relied on fault-based considerations led his critics to advance his theory as further evidence of the vital role that fault plays in tort law's morality.[167]

Alternatively, and more correctly, one may view Epstein's theory as progressing not toward implicit acceptance of fault-based liability but toward a system which permits greater consideration of the relevant factual context. In other words, a legal system based upon Epstein's initial article would impose liability in the bulk of cases with a minimum of process. In most cases, it is a fairly easy matter to determine causation.[168] The development of Epstein's theory to include subsequent pleas and defenses would, in practical application, require more extensive factual and contextual consideration of the case. The progression of his theory may thus constitute an implicit recognition of the process-based dimension of corrective justice.

C. Implications for the Tort System

In short, there is something important to be gained from the theory of corrective justice. Even though corrective justice theorists who focus on whether fault underlies liability are not asking precisely the right question, they are correct in asserting that there is an important dimension to tort law that economic/utilitarian or other instrumental accounts fail to capture. They are also correct in characterizing that dimension as moral. Tort law is moral; sometimes as a matter of substance, but generally as a matter of the tort processes which substantive tort principles require. Nonetheless, important questions remain. First, given the moral dimensions of the tort system, would its replacement involve an immorality? If not, does the moral dimension of the present system outweigh concerns exposed by instrumental critiques?

Under substantive corrective justice as espoused by Ernest Weinrib, Jules Coleman, and others, replacement (or wide-reaching reform) of the system would not, in itself, involve an immorality. Substantive corrective justice theory does not mandate utilization of the current system. Weinrib consistently maintains that dispensing with corrective

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167. Epstein, *Causation in Context*, *supra* note 8, at 654. Epstein himself has concluded that strict liability based upon causation involves vast potential liability which can be limited only by excuses or justifications "so extensive that causation would recede quickly into the background, as a preliminary step in an analysis that, rightly understood, turned ultimately on other considerations." *Id.*

168. *See, e.g.*, *supra* note 145 and accompanying text.

justice as a system of bilateral tort adjudication would not involve any immorality.[169] Coleman agrees:

> [T]he state for a variety of presumably good reasons might choose to forgo implementing in law the demands of corrective justice. It can choose, for example, not to have a tort system, even if the tort system is itself the legal embodiment of the ideal of corrective justice. . . . [A]lthough corrective justice is private justice—justice between the parties—whether or not it imposes obligations between the parties depends on other social, political and legal practices.
>
> If corrective justice is conditional in this sense, then the state may choose to allocate accident costs in any number of ways. It may do so through a tort system that implements corrective justice; it may do so through a New Zealand no-fault scheme; it may do so through a generalized at fault plan; it may do so through a variety of localized or limited at fault plans. It may do so through a tort system that seeks to spread or minimize risk; or it may seek to do so through a tort system that seeks to do a combination of these things; and so on.[170]

The current use of alternative compensation systems such as workers' compensation and auto no-fault plans support this conclusion. Many criticize workers' compensation and auto no-fault systems on various grounds, but substantive immorality is not among them. In these alternative systems, substantive corrective justice has been replaced by another form of justice operating outside the bilateral structure of current tort litigation. Communal notions of responsibility and concerns about compensation have shifted such that they no longer implicate corrective justice as a distinct form of justice in workers' compensation or auto no-fault cases.[171]

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169. Weinrib, *Corrective Justice*, *supra* note 9, at 412, 414-15; Weinrib, *Special Morality*, *supra* note 9, at 412; Weinrib, *Understanding Tort Law*, *supra* note 9, at 494-95.

170. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 402-04.

171. In the context of mass torts, similar shifts may be occurring. The individualized tort system is not particularly well-suited to handling numerous claims arising from a single incident or cluster of similar incidents. For illuminating discussion of ways to resolve issues raised by mass torts, see Francis E. McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management*, 19 FORUM 1 (1983); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986).

While abolition or reform of the tort system may not involve immorality under substantive corrective justice, it may be problematic from the perspective of corrective justice as process. Various proposed tort reforms would limit or eliminate the litigants' ability to participate in decision-making. At least one scholar who has reviewed comprehensive alternative compensation systems has reached the general conclusion that such alternatives inappropriately sacrifice procedural fairness. As James A. Henderson, Jr. explains:

> Moving from a properly functioning common law tort system to a system like that in New Zealand might cause many citizens to feel that traditional commitments to fairness had been compromised or even abandoned. Although more victims of misfortune would be receiving benefits under the new regime and in a democracy it may be presumed that the appropriate balance of interests has been struck, I would not be surprised to discover a general feeling in the community that fairness to the individual had been sacrificed in the name of the greatest good for the greatest number.[172]

Implementing an alternative compensation scheme would not in itself necessarily involve immorality from the perspective of procedural corrective justice. Nevertheless, experiences with alternatives to tort law in this country may suggest that process-based values associated with the tort system are more important than some reformers recognize. Social insurance systems like workers' compensation or auto no-fault provide injured persons with certain, uniform and efficient compensation (at least relative to the tort system). Both systems, however, are subject to numerous exceptions: auto no-fault, by legislative design; and workers' compensation by a combination of statutory and judicially-developed rules which permit circumvention of the system. Auto no-fault plans allow tort recoveries for non-covered economic losses and for intangible losses in specified, but typically broad, circumstances.[173] As a statutory matter, workers' compensation plans typically recognize defenses to liability under the system.[174] Similarly, employer misconduct may, as a

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172. James A. Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781, 798 (1981). For general discussions of New Zealand's Accident Compensation Act, *see, e.g.*, TERENCE G. ISON, ACCIDENT COMPENSATION: A COMMENTARY ON THE NEW ZEALAND SCHEME (1980); GEOFFREY PALMER, COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA (1979).

173. *See generally* ROBERT H. JERRY, III, UNDERSTANDING INSURANCE LAW § 134 (1987).

174. These defenses include, for example: employee intoxication or impairment as a result of illegal drug use, wilful misconduct resulting in injury, wilful refusal to use employer-provided safety equipment, or wilful failure to obey an employer's safety rules. *See* ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 30-36.50 (1992).

statutory matter, permit an injured employee to maintain a common law action against the employer.[175] Judicially developed rules also undercut the exclusivity of workers' compensation by permitting injured workers to take advantage of the tort system.[176]

The proliferation of tort exceptions to existing alternative compensation schemes demonstrates the importance of process. Even though these alternatives were designed to eliminate some of the costs of the tort system, they include or revert to more costly and more contextual processes associated with tort law. There are other possible reasons for the exceptions,[177] but fairness concerns arising from the limited opportunities for participation in the process, although not quantifiable, are central.

The remaining, and more difficult issue, is the proper balance of process-based morality against other important concerns which arguably point to replacement of the current tort system. The values of individual fairness furthered by the present system compete against other values not well served by tort, including: horizontal equity, adequacy of com-

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175. For example, failure to provide safety equipment or to obey safety regulations may result in such an action. *Id.* § 69.

176. Courts permit employee actions against third-party defendants, typically manufacturers or suppliers of equipment used in the workplace. Some jurisdictions permit third-party defendants to obtain contribution from a negligent employer. *E.g.*, Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978); Lambertson v. Cincinnati Corp., 114, 257 N.W.2d 679 (Minn. 1977); Dole v. Dow Chem. Co., 282 N.E.2d 288 (N.Y. 1972). *See generally* Lockheed Aircraft Corp. v. U.S., 460 U.S. 190 (1983) (exclusive liability provision of Federal Employees' Compensation Act no bar to third party action against the U.S.). Other bases for a tort action against the employer include intentional injury by the employer, *see* 2A LARSON, *supra* note 174, § 68, and the judicially-created intentional risk and dual capacity doctrines. *See id.* at §§ 68.13, 68.15, 72.80. However, statutes or judicial decisions have generally rejected these latter doctrines. *See generally* Merton E. Marks, *Status of the Exclusive Workers' Compensation Remedy: Actions by Employees Against Coemployees, Employers and Carriers*, 22 TORT & INS. L.J. 612 (1987).

177. The proliferation of exceptions is not entirely attributable to process-based fairness considerations. A number of the exceptions permit use of the tort system where fault, in the sense of intentional or wilful misconduct, exists. The exceptions may demonstrate nothing more than the tenacity of the fault concept in our legal system. Another obvious cluster of reasons for the exceptions are financial. There is a great deal of money to be made through the tort system. It is in the financial interests of lawyers to oppose replacement of the tort system. It is in the financial interests of prospective plaintiffs to sue in tort if they can. However, the design of auto no-fault systems, and the exceptions to exclusivity of workers' compensation, even if attributable to a confluence of factors, also illustrate the importance of process. In an important sense, the element of fault in some of the workers' compensation exceptions serves as a marker for process; the potential for larger tort awards reflects the ability of the flexible torts process to achieve adequate compensation where scheduled recoveries cannot.

pensation across a range of cases, and efficiency of administration.[178] To some extent, process-based and substantive values conflict with these instrumental goals. The solution, however, is not necessarily to determine which principle or value is paramount, but to achieve resolutions which accommodate as many of those values as possible.

Conceptualizing the problem in this way suggests that a two-tiered approach, consisting of a comprehensive compensation system with optional individualized remedies, may be optimal. Such a system would satisfy both instrumental and corrective justice concerns. A comprehensive accident compensation system implemented in conjunction with regulatory measures aimed at deterrence[179] would address the legitimate concerns of those who charge that the negligence system is an extremely costly "lottery" which undercompensates serious injuries, overcompensates minor injuries, and provides very little deterrent effect.[180] The possibility of alternative or additional individualized remedies which claimants may utilize at their option would address fairness concerns. Within this broad two-tiered structure, numerous approaches are possible. A system of mandatory accident insurance scheduled and administered like worker's compensation could possibly accommodate corrective justice as well as instrumental concerns if it permitted individuals to petition a governing agency to proceed in tort for amounts above scheduled benefits.[181]

Existing auto no-fault plans raise other options. Such schemes commonly provide minimum levels of compensation for all claimants who state a prima facie case. The current system permits supplemental tort actions in specified circumstances, typically based upon the extent and nature of injuries. Other tort/no-fault hybrids suggest additional alternative structures. The National Childhood Vaccine Injury Act of 1986,[182] for example, requires claimants to establish a specified injury from a

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178. The view of corrective justice as an interplay of substance and process may suffer from some of the same shortcomings as substantive corrective justice. As Stephen Sugarman charges, "exponents of corrective justice often have a naive air about them," Sugarman, *Tort Law*, *supra* note 2, at 604. Perhaps this observation applies whenever facts and discussions focus on fairness or morality as opposed to statistics. But the difficulties of quantifying the concerns expressed by corrective justice theorists do not render those concerns less real.

179. Such as that proposed by Sugarman, *supra* note 2, or implemented in New Zealand, see *supra* note 172 and accompanying text.

180. *See supra* notes 6, 44-51, and accompanying text.

181. The scheduling of benefits at adequate levels would be crucial to the success of any such alternative. Existing benefits under workers' compensation laws in most states are grossly inadequate. For a useful marshalling of the troubling statistics, see Marc Feldman, *The Intellectual Ordering of Contemporary Tort Law*, 51 MD. L. REV. 980, 1003-07 (1992).

182. 42 U.S.C. §§ 300aa-10 to 300aa-34 (1988).

covered vaccine in a proceeding before a special master who calculates damages based on a combination of individualized and averaged measures. Under the act a claimant may reject the decision of the special master and proceed in tort, subject to defenses permitted in products liability actions. The Superfund 310(e) Report[183] and the Environmental Law Institute Model Statute,[184] neither of which has been adopted, would establish similarly structured compensation schemes.

Other variations are possible. Instead of a tort option, the system could provide alternate mechanisms for individualized consideration of claims via professional mediation, or the use of a special master, or through bench trials. Each of these options have the potential for achieving increased efficiency, greater uniformity, and more adequate compensation than the present system. Moreover, it would permit contextualized judgments where fairness concerns warrant them.[185]

III. Conclusion

Corrective justice theorists correctly argue that tort law furthers important community concerns. They are mistaken, however, in their attempts to identify its morality with the formal element of fault. The ideal of individual liability in tort only in the presence of fault holds a great deal of intuitive moral appeal. However, allocating losses to a morally blameless individual who has caused harm rather than to an equally blameless victim is also intuitively appealing. The tort system recognizes and accommodates both of these competing moral ideals. This fact, among others, precludes moral justification of the present system of negligence as fault-based. Society accepts negligence law as just, whether or not it involves fault, because it requires individualized assessments of liability. Society accepts current applications of "strict" liability as just for the same reason. Thus, we object not to the idea that a court may impose liability in tort without fault (as in non-fault negligence under the objective standard), but to the requirement that

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183. Injuries and Damages From Hazardous Wastes—Analysis and Improvement of Legal Remedies, S. Comm. on Env't & Pub. Works, No. 97-12, 97th Cong. 2d Sess. (1982).

184. Jeffrey Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, 7 Harv. Envtl. L. Rev. 177, 250-96 (1983).

185. Contextualization is unilateral under the first tier of each of the proposals of this type: defendants have no ability to present evidence unless a claimant chooses an alternative to scheduled recovery. This one-sidedness is not particularly problematic on fairness grounds, depending upon the funding of the comprehensive no-fault scheme. If a claimant chose to pursue an alternative second tier remedy, a defendant would also be entitled to individualized consideration of the facts.

courts must impose it without process (as in true strict liability). Tort law's capacity for individualized, contextualized judgments, and not its substantive rules of liability, provide the source of its morality.

Under this account, corrective justice is a social and a legal practice which provides a moral account of tort law. Conceptualizing corrective justice as involving a contextualized interaction of substance and process may *not* provide a compelling rationale for the perpetuation of the present system of tort litigation. Other alternatives, such as those suggested above, may better accommodate a variety of values, including process-based values. But an explicit recognition of the importance of individualization to tort law and the corresponding centrality of process is crucial to the exploration of alternatives. We cannot gauge other possibilities unless we recognize the nature and value of the system we propose to alter.

Antitrust Liability for Collective Speech: Medical Society Practice Standards

MARK R. PATTERSON*

> While it would probably be excessive to say that the fox is guarding the chicken coop, it is undeniable that a great many critical judgments in [the medical] field are being made by persons with a direct economic stake in particular outcomes . . . . The vast majority of physicians and their organizations sincerely believe that they are acting in the public interest. Yet this is not enough. To be genuinely well served, the public must have assurance that those in control are responsive to consumer needs.
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> —Former F.T.C. Chairman Michael Pertschuk[1]

INTRODUCTION

In the provision of professional services,[2] as in other commercial arrangements, the antitrust laws are intended to preserve competi-

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1. Statement prepared for presentation to the Subcommittee on Health and Scientific Research of the United States Senate, Oct. 10, 1977, *quoted in* American Medical Ass'n v. F.T.C., 638 F.2d 443, 455 (2d Cir. 1980) (Mansfield, J., dissenting), *aff'd by an equally divided Court per curiam*, 455 U.S. 676 (1982).

2. This Article focuses particularly on medical services. In part, that is because it responds to several recent decisions regarding standard-setting in medical societies. But it is also because medical standard-setting remains a largely private activity, in contrast to, for example, the same process in the legal profession, where standards of the American Bar Association are often adopted by state supreme courts. *See, e.g.*, MASS. SUP. JUD. CT. R. 3:07 (setting out "canons and rules [that] are based on but are not identical to the American Bar Association 'Code of Professional Responsibility and Canons of Judicial Ethics' (1970)"). State action in standard-setting is exempt from antitrust scrutiny to the extent that the government involvement meets certain established requirements. *See infra* text accompanying notes 241-46.

The proposals made here are also relevant to non-professional standard-setting. However, non-professional standards present less of an antitrust problem for several reasons. First, the members of industrial standard-setting organizations, unlike those of professional societies, are in many cases not competitors in the field to which their standards apply. Second, industrial organizations often do not possess, at least to the extent that professional societies do, specialized expertise that the general public lacks. Finally, perhaps because of their relative lack of specialized knowledge, industrial organizations are not deferred to by the public as readily as are professional societies. *See infra* text accompanying notes 33-43.

tion.[3] Ideally, the laws protect the ability of consumers to receive the professional services they desire and the ability of individual professionals to provide those services. In promoting this goal, the laws can conflict with the activities of professional societies, which directly and indirectly restrict the services provided by their members. The societies' activities take a variety of forms, from establishing certification requirements[4] to enacting codes of ethics[5] and practice standards,[6] but all are agreements[7] imposing restraints of one form or another on professional services.[8] Of course, not all of the restraints are anticompetitive.[9] Some benefit not only the professionals themselves, but also the consumers of professional services as well. Establishing education and training requirements, for example, both ensures that professionals

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3. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) ("The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions." (citations omitted)).

4. The basic functions of most professional societies are the establishment and enforcement of membership credentials, which necessarily limit the activities of their members, both prior to and after joining the society. *See* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 90-91 (1982) (noting that the formation of the American Medical Association had two basic purposes: to standardize the requirements for medical degrees and to adopt a code of professional ethics, "with its concern for excluding sectarian and untrained practitioners"); Clark C. Havighurst & Nancy M. P. King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective* (pts. 1 & 2), 9 AM. J. L. & MED. 131, 9 AM. J. L. & MED. 263 (1983).

5. *See, e.g.,* American Medical Association, Principles of Medical Ethics (1980); Council on Ethical and Judicial Affairs, American Medical Association, Current Opinions (1989) ("intended as an adjunct to the revised Principles of Medical Ethics").

6. *See, e.g.,* American Society of Anesthesiologists, Basic Standards for Preanesthesia Care (1987), Standards for Basic Intra-Operative Monitoring (1986) (amended 1992), Standards for Postanesthesia Care (1988) (amended 1992).

7. *See* 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1477 (1986) ("Although the issue is seldom discussed, trade associations are routinely treated as continuing conspiracies of their members, as are bodies promulgating rules or standards for the competitive conduct of their members, such as the National Society of Professional Engineers.").

8. Of course, professional societies today also serve an important educational role, independent of their other functions. But the very importance of that role pressures professionals to join and therefore to comply with the societies' requirements. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 139-40 (1971 ed.) ("The many technical publications of the American Medical Association, and the state and local medical societies, also give the doctor a considerable incentive to affiliate with organized medicine.").

9. As expressed in the Supreme Court's often-quoted statement establishing the scope of the Sherman Act's § 1, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).

possess a basic level of competency and communicates information regarding that competency to consumers.[10]

However, professional standards, especially in medicine, often go well beyond the basic requirements for professional competence to prescribe (or proscribe) particular methods of practice.[11] Because there are often differences of opinion regarding the appropriateness of particular services, especially when they are new,[12] the establishment of standards inevitably places some professional services outside the officially accepted area of practice. Furthermore, the standards are generally established by a professional society's mainstream members, who have a vested interest in continuing to practice by the profession's established methods. In such a situation, where a group's economic interests coincide with its regulatory power, skepticism regarding the exercise of that power is warranted.[13] Indeed, at least one physician has suggested that a doctor's evaluation of a controversial procedure can depend on whether he profits from it.[14] Even putting aside the problem of immediate economic incentives, it has been observed that there is a general conservatism and reluctance to accept innovation among professionals.[15]

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10. For discussions of both pro and anticompetitive aspects of the certification process, see Havighurst & King, *supra* note 4.

11. *See* David M. Eddy, *Practice Policies—What Are They?*, 263 J. A.M.A. 877, 877 (1990) (They are "preformed recommendations issued for the purpose of influencing decisions about health interventions."); *see also* Clark C. Havighurst, *Practice Guidelines for Medical Care: The Policy Rationale*, 34 ST. LOUIS U. L.J. 777 (1990) (describing several recent initiatives, both private and public, that promote practice standards).

12. As an example, even a technique as widely accepted as magnetic resonance imaging (MRI) was initially the subject of dispute. *See* Goodman v. Sullivan, 891 F.2d 449, 450 (2d Cir. 1989) (affirming denial of Medicare coverage for MRI treatment on the ground that it was "not yet generally accepted in the medical profession"). *See also* James S. Goodwin & Jean M. Goodwin, *The Tomato Effect: Rejection of Highly Efficacious Therapies*, 251 J. A.M.A. 2387 (1984) (describing the medical establishment's rejection of various effective treatments that did not fit its then-current theories).

13. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) ("There is no doubt that the members of such [private standard-setting] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.").

14. *See* Gina Kolata, *Amid Fears About a Fetal Test, Many Are Advising Against It*, N.Y. TIMES, July 15, 1992, at C13, col. 4 (quoting Dr. Benjamin Sachs, obstetrician-gynecologist-in-chief at Beth Israel Hospital and Harvard Medical School as stating that in the evaluation of chorionic villus sampling, a prenatal test, "there had been a very unfortunate 'polarization, depending on whether people make money on the procedure'").

15. *See, e.g.*, Gina Kolata, *A Tradition of Caution: Confronting New Ideas, Doctors Often Hold On to the Old*, N.Y. TIMES, May 10, 1992, § 4, at 6, col. 1:

> Doctors generally are "reactionary," said Dr. Jeffrey Isner, a cardiologist at Tufts University School of Medicine. "As a group, they are relatively slow

Of course, given the special expertise possessed by professionals, it is not surprising that much information regarding the practice of the profession originates with the profession itself. But it is exactly the advantage in knowledge that professionals possess over the public that creates a danger of anticompetitive activity. Because consumers typically have not received professional training, they are unable to effectively evaluate the professionals' claims for their services.[16] This would not present a problem if each professional operated independently, and was not subject to the influence of professional societies. In that case, competing professionals would step in to provide alternative descriptions of their services, and free competition would prevail. However, very little of the information received by consumers comes from individual professionals.

Instead, professional societies have taken on the role of providing a wide range of information and guidance, both to their members and the public at large. Medical societies, of course, claim that this role for professional groups is desirable and procompetitive.[17] Legal commentators generally agree, asserting that the societies' production and communication of information benefit the market because they provide valuable professional expertise[18] and because they help remedy the information advantage otherwise possessed by professionals.[19] This might

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> to accept new ideas. There is a lot of criticism—'Oh, it will never work.' 'Oh, that's crazy.' A lot of negative responses."
>
> Much of it is a reflection on medical school, specifically which students are chosen and how they are trained, Dr. Isner said. "You spend a lot of time learning and memorizing how you're supposed to deal with things," he explained. "Now someone says, 'We're going to do it a different way.' That means all your investment is worthless."

See also Joe Sims, Maricopa: *Are the Professions Different?*, 52 ANTITRUST L.J. 177, 177 (1983) ("[Another] significant distinction between the professions and other occupations is that many in the former camp actively seek to discourage entrepreneurial efforts by their counterparts, going so far as to seek to label as unethical (and thus presumably bad) the use of normal business organization structure for the marketing of services.").

16. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 490 (1988) (O'Connor, J., dissenting) ("[M]arket forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that [physicians and lawyers] possess.").

17. *See* AMERICAN MEDICAL ASSOCIATION, LEGAL IMPLICATIONS OF PRACTICE PARAMETERS (1990).

18. *See* Clark C. Havighurst, *Applying Antitrust Law to Collaboration in the Production of Information: The Case of Medical Technology Assessment*, 51 LAW & CONTEMP. PROBS., Spring 1988, at 341, 350 ("The participation of professional organizations in technology debates . . . offers the public access to a valuable reservoir of knowledge and insight.").

19. *See* Thomas L. Greaney, *Quality of Care and Market Failure Defenses In*

be true if consumers were assured that the information were accurate, or if, in case it were inaccurate, equally accessible alternative sources of information were available.[20] But when a large, respected group gains a position of dominance from which its voice is virtually the only one heard, its statements, if incorrect, have a great potential for harm.[21] This is especially true of a professional group, due to the difficulty that outsiders have in evaluating that information.

Therefore, a professional society should not be permitted to issue evaluations describing practices as appropriate or inappropriate without ensuring that its statements leave the ultimate choice with consumers.[22] For example, if there is a possibility that consumers may be misled by its subjective evaluations, a society should confine its statements to objective and verifiable facts.[23] The Supreme Court's opinions are consistent with this view. Its opinions in both the antitrust and commercial speech areas have demanded objectivity from professionals and standard-setting organizations.[24] Moreover, a society should not be permitted to indirectly control consumer choices by determining which

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Antitrust Health Care Litigation, 21 CONN. L. REV. 605, 664 (1989) ("Information supplied in this fashion—evaluating the scientific status of a procedure and the advisability of routinizing it by deeming it non-'experimental'—obviously counteracts information asymmetries in the health insurance market.").

20. *See* Havighurst & King, *supra* note 4 (pt. 1), at 154 n.72 ("Of course, where a self-certified group of professionals enjoys a substantial degree of monopoly power, there exists, by hypothesis, no close competitors who can be counted on to dispute its unwarranted claims of superiority. In such a case, the primary hope must be for competition to break out within the monopolistic group itself as individuals and subsets of providers within the group seek to differentiate themselves from their supposed peers.").

21. *See* Martin Rose & Robert F. Leibenluft, *Antitrust Implications of Medical Technology Assessment*, 314 N. ENG. J. MED. 1490, 1492 (1986) ("[S]ome concern about antitrust implications is warranted, even in the case of the expression of the opinion of a medical specialty society, if such expression is likely to have a substantial effect in the marketplace.").

22. *See* Havighurst, *supra* note 18, at 353 ("[A] professional organization pronouncing its opinions on medical technologies is quite likely to believe that its word should be received not merely as advice, but as gospel. If the effect of its pronouncements is to perpetuate a professional monopoly over crucial choices concerning medical care, there would be a problem that might concern an antitrust court.").

23. *See infra* section III.A. A society may also require its members to refrain from false or deceptive claims. *See infra* text accompanying notes 276-77.

24. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) (stating that private standards should be "based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition."); Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91, 110 (1990) (holding that state licensing boards can require that professionals' advertisements be based on "objective and consistently applied standards."); *see also infra* sections II.C. & II.D.

medical services will be reimbursed by medical insurers.[25] The medical services market should be permitted to function free of the intervention of groups of practitioners.[26] As the Supreme Court said in a medical society case, the antitrust laws serve to prevent agreements that "may deter experimentation and new developments by individual entrepreneurs."[27]

One would therefore expect the courts to provide a forum where consumers or professionals suffering from the anticompetitive effects of society standards could bring antitrust challenges to those standards. However, to a great extent, the lower courts have failed to let antitrust law meet that expectation. Until recently, courts often gave professional standards *ad hoc* antitrust exemptions that would never be given to agreements by other groups. The courts deferred to professional societies' judgments regarding, for example, the importance of the scientific method in patient care.[28] More recently, in response to the Supreme Court's explicit rejection of quality of care defenses,[29] courts have relied instead on what they characterize as the purely advisory, non-coercive nature of professional standards.[30] This Article presents

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25. *See infra* section III.B.

26. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 462 (1986) ("The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.").

27. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348 (1982).

28. *See* Wilk v. American Medical Ass'n, 719 F.2d 207, 227 (7th Cir. 1983) (approving a jury instruction to the effect that even if the plaintiffs showed that the defendants' actions restrained competition, rather than promoted it, the defendants would not be liable if they could show "(1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of [the standard at issue] and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition."), *cert. denied*, 467 U.S. 1210 (1984). There is no support in the Sherman Act for this elevation of concern for the scientific method to a privileged status. The Act is concerned not with the "competition of ideas" engendered by the scientific method, but with the competition of the market, as even *Wilk* stated elsewhere in the opinion. *See* 719 F.2d at 225 (rejecting the district court's jury instructions because they were not "geared simply, clearly, and exclusively to the question whether the challenged conduct promoted or suppressed competition").

29. *See, e.g.,* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 25 n.41 (1984) ("[W]e reject the view of the District Court that the legality of an arrangement of this kind [tying] turns on whether it was adopted for the purpose of improving patient care."); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 694 (1978) ("[A] purchaser might conclude that his interest in quality—which may embrace the safety of the end product—outweighs the advantages of achieving cost savings by pitting one competitor against another.").

30. *See, e.g.,* Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d

two responses. First, coercion has never been a requirement for the application of the antitrust laws.[31] Second, even advisory standards can have a significant anticompetitive impact, both on patients and on insurers.[32]

The remainder of this Article is divided into four parts. Part I provides an overview of the nature of the professional standards of concern in the Article and discusses two recent cases challenging such standards. Part II describes the applicable legal precedent, particularly in the Supreme Court, regarding private standard-setting, and discusses more generally the anticompetitive effects of private medical standards. Part III offers proposals for determining antitrust liability for medical standards and discusses how societies can avoid such liability. Part IV concludes with a discussion of the role professional societies would play if the proposals of Part III were adopted.

I. Medical Practice Standards

The specific standards of concern in this Article are those through which medical societies influence their members' methods of practice.[33] They include, for example, standards that regulate particular surgical techniques[34] or that mandate the selection of specific medical personnel to perform certain services.[35] It is in these aspects of professional practice that standard-setting presents particular problems, for two reasons. First, it is in these areas that professional judgment is most important, and, therefore, where restrictions on that judgment can be most harmful. Second, it is also in these areas that outside evaluation of the standards is most difficult, due to the special expertise of

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397, 397-98 (7th Cir. 1989) ("There can be no restraint of trade without a restraint. . . . [The Academy] did not require its members to desist from performing the operation or associating with those who do."); *see also* John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 San Diego L. Rev. 301, 309 (1991) ("Obligations' that are not enforced have little relevance to an analysis of the antitrust implications of professional rules." (footnote omitted)).

31. *See infra* section II.A.

32. *See infra* sections II.B & II.C.

33. *See* Eddy, *supra* note 11, at 878 ("Practice policies are extremely versatile. In addition to supporting individual decisions between practitioners and patients, practice policies can be used to specify who should perform a practice ([e.g.], accreditation), how it should be performed ([e.g.], performance criteria), where it should be performed ([e.g.], inpatient vs[.] outpatient), on whom it should be performed ([e.g.], patient indications), and whether it will be paid for ([e.g.], precertification criteria and coverage policies.").

34. *See infra* section I.B.

35. *See infra* section I.A.

professionals.[36] In other areas, such as price, outsiders (e.g., consumers of professional services or the courts) are generally able to evaluate the reasonableness of professional regulations.[37]

In some respects, the professional standards considered here are similar to standards for manufactured products.[38] In both cases, a private group issues its judgment as to the acceptability of particular products or services. However, the anticompetitive problems of professional standards are more fundamental than those of industrial standards.[39] For example, the uniform nature of manufactured products makes them fitter subjects of standards. Professional services are, or should be, the antithesis of such products. They should be tailored to the needs of the individual patient or client in a way that makes them unsuitable for standardization.[40]

More important, though, are the differences in the entities that establish the two kinds of standards. Industrial standards are often established by organizations (*e.g.*, Underwriters Laboratories or the American Society of Testing and Materials) whose primary purpose is standard-setting. Such organizations are, as the Supreme Court has observed, "composed of members with expertise but no economic

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36. That does not mean, however, that courts should not review such standards. A court need not conduct a substantive review of the standard itself to determine that its effect is to deny individual professionals a meaningful opportunity to choose whether to conform to it.

37. Price-related standards have received more attention from the Supreme Court than have other practice standards. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); *but see* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) (agreement not to provide x-rays for review by insurers).

38. Standards for industrial products are exemplified by those at issue in two recent Supreme Court cases. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

39. This is not to say that the anticompetitive dangers of industrial product standards are insignificant. *See, e.g.*, 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1503a (1986) ("Product standardization might impair competition in several ways. . . . Such standardization might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices.").

40. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 n.25 (1976) ("Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature . . . ." (emphasis in original)); *see also* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 487 (1988) (O'Connor, J., dissenting) (noting the "defective analogy between professional services and standardized consumer products").

interest in suppressing competition."[41] Professional standards, in contrast, are established by organizations whose members are providers of the services to which the standards apply. The temptation is great for a provider to promote standards favorable to his own services. It is this danger on which the Supreme Court has focused in its opinions regarding standard-setting associations:[42] "There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm."[43]

The following sections discuss the realization of that potential as evidenced in two recent cases challenging medical society standards directed at two different groups: patients and third-party payers of medical bills.[44] It will be apparent that the facts in these cases are not well developed. That is in part because they arose on motions for summary judgment. However, as is argued in Parts II and III, it is also partly due to the courts' failure to recognize the nature of the potential anticompetitive harm in these cases. This has resulted in a focus, by both courts and litigants, on more peripheral issues. In any event, the point here is not to prove that the actions in these particular

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41. *Allied Tube & Conduit Corp.*, 486 U.S. at 510 n.13. As an example, the Court cited Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458 (9th Cir. 1987), *vacated on other grounds*, 487 U.S. 1213 (1988). The trade association in *Sessions* allowed industry members to serve on committees considering new standards and to participate in hearings regarding them, but it permitted only public officials to vote on the standards. *Id.* at 460-61.

42. It is notable that in the cases that the Supreme Court has heard regarding industrial standards, the organizations involved were trade associations more akin to professional societies than to pure standard-setting organizations. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (*per curiam*).

43. *Allied Tube & Conduit Corp.*, 486 U.S. at 500 (footnote and citation omitted); *see also American Soc'y of Mechanical Eng'rs*, 456 U.S. at 571 ("Furthermore, a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes. Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers.").

44. Although the text speaks of standards' effects on patients and third-party payers, it is likely that, to the extent those effects are anticompetitive, they would be challenged not by those groups themselves, but by physicians affected indirectly through decreased demand for their services. See *infra* sections III.A and III.B. It is one of the main points of this Article that much of the doctrinal confusion in this area is caused by a failure to distinguish between direct effects on providers, which reduce supply, and indirect, but still anticompetitive, effects on them, which are produced by a reduction in demand by consumers.

cases were anticompetitive. The point is to examine the true nature of the harm to competition in these cases and to show the economic incentives that medical societies have in enacting their standards.

A. The Effects of Standards on Patients

Koefoot v. American College of Surgeons[45] was a dispute between the American College of Surgeons (ACS) and Dr. Robert Koefoot, formerly a fellow of the ACS, regarding the ACS's rule forbidding "itinerant surgery."[46] The ACS defined "itinerant surgery" as surgery "under circumstances in which the responsibility for diagnosis or care of the patient is delegated to another who is not fully qualified to undertake it."[47] Because the ACS's position was that a physician was not qualified to provide post-operative care unless he was as qualified as the operating surgeon, the rule effectively reserved all post-operative care to surgeons.[48]

Dr. Koefoot practiced in rural Nebraska and performed some "typically less complex and more routine" surgery at hospitals outside the city where his practice was based.[49] Post-operative care for those procedures was provided by general practitioners at the hospitals. Dr. Koefoot admitted that this practice constituted "itinerant surgery" as defined by the ACS, but he refused to stop it, and he was first suspended and then expelled from the ACS. The ACS's position was that "[i]f Dr. Koefoot chooses not to drive 20 miles to [the local hospitals] to see his patients, if Dr. Koefoot disagrees with the College policy, or

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45. 610 F. Supp. 1298 (N.D. Ill. 1985).

46. *See generally id.* at 1300-03.

47. *Id.* at 1300.

48. *Id.* at 1300, 1303. According to the plaintiffs' allegations, the rule "inhibited the ability of rural community hospitals to compete with hospitals in major metropolitan areas, of surgeons in Dr. Koefoot's position to compete with local surgeons, and of general practitioners to compete with surgeons in the provision of post-operative care." *Id.* at 1303.

49. The court provided the following description of medical practice in Nebraska:

> Plaintiffs provide medical care in the State of Nebraska, largely a rural state consisting of 92 counties, comprising approximately 70,000 square miles. In 1980, there were approximately 2,300 doctors in Nebraska, of whom 181 were general surgeons, such as Dr. Koefoot. Over 70% of the state's population resides in 21 of the 92 counties, located in and around the major cities of Omaha and Lincoln. Those 21 counties had 89% of the physician population, leaving only 247 physicians to serve the remaining 71 counties with their 457,000 residents. The state has 116 hospitals. The area outside that known as the "Fish Hook" has only 247 physicians to serve over 63,000 square miles and 450,000 people, a ratio of 1,850 people per doctor. Thus, the practice of rural medicine in Nebraska is vital to the health of its general populace.

Id. at 1301.

if Dr. Koefoot chooses to spend his time on pursuits other than surgery, that is his perfect right. But he may not call himself a Fellow of the American College of Surgeons."[50]

Dr. Koefoot alleged that he suffered a variety of injuries as a result of this dispute. He said that his surgery practice declined[51] and that he suffered a variety of professional injuries.[52] It is important to note, however, that it was apparently only the latter injuries that stemmed from his expulsion from the ACS. For example, Dr. Koefoot said that the expulsion made it difficult for him to hire an associate, reduced the frequency with which he was employed as an expert witness, and injured his relationships with other doctors.[53] All of these injuries related to Dr. Koefoot's dealings with his fellow professionals, not his dealings with patients. He did not allege that his surgical practice was harmed by the expulsion.

Instead, Dr. Koefoot attributed the decline in his practice to "the publicity resulting from the disciplinary charges of unethical surgery relating to the delegation of post-operative care of patients under [his] supervision to family practitioners," and said that patients had declined to have surgery in their local hospitals "because of the accusations of unethical surgery."[54] These claims can be interpreted in two ways. The patients might have declined to receive surgery from Dr. Koefoot because of charges that he practiced in an unethical fashion, or they might have declined to receive itinerant surgery from anyone, including Dr. Koefoot, because of the allegations that the practice itself was unethical. In either case, the injuries to Dr. Koefoot's practice were caused by the influence the ACS's rule had on the decisions of his potential patients, not by his expulsion.[55] There is no mention in the

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50. *Id.* at 1303.
51. *Id.* at 1307-09.
52. *Id.* at 1307-08.
53. *Id.* at 1308.
54. *Id.* at 1308-09.
55. It does not appear from the case that the ACS publicized its expulsion of Dr. Koefoot. In any event, he could have suffered the same damage from negative publicity regarding his practice methods even if he had never been a member. An informative contrast is provided by Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984), which reversed a grant of summary judgment in favor of the defendant medical society. The society standard in *Kreuzer*, similar to that in *Koefoot*, required the society's "active" members to confine their practices solely to periodontology. However, the focus of the *Kreuzer* court was on the society's policy, when contacted by potential patients, to provide referrals only to active members, as defined by the standard. The court observed that the standard harmed consumers in two ways: (1) they would never be referred to periodontists who refused to conform to the society's rule, thus limiting the number of periodontists available to them, and, therefore, increasing the market price;

case that patients were even aware of his expulsion from, or his prior membership in, the ACS.

Thus, merely by calling Dr. Koefoot's method of practice "unethical," his competitors in the ACS were able to damage his business. And they had an obvious economic interest in doing so. Any rule that justified a surgeon's refusal to allow another, perhaps lower-paid physician to perform post-operative care preserved the income from that service for the surgeon. The director of the ACS had even admitted that one of the purposes of the rule was to protect surgeons in local practices: "We had been thinking in terms of the practice of itinerant surgery freezing out young men who might wish to come into a community to practice."[56] The ACS claimed that the rule was necessary to assure "the highest quality post-operative care,"[57] but it apparently presented no evidence for that claim. Dr. Koefoot asserted that he had an "extremely low rate of post-operative complications."[58]

Under these circumstances, it is reasonable to question the ACS's condemnation of itinerant surgery. Consider the following comment from the District of Columbia Circuit considering a similar society rule:

> [W]e can set the following standard for application of a rule of reason analysis to questioned conduct of professional associations justified under a patient care motive. When the economic self-interest of the boycotting group and its proffered justifications merge the rule of reason will seldom be satisfied.[59]

This well-describes the danger presented when a group of competitors has the power to issue influential standards regarding its own practices and those of competing groups. In *Koefoot*, where the ACS apparently was unable to provide any evidence that patient care benefitted from its rule against itinerant surgery, or any reason for labelling the practice "unethical," it seems likely that the rule was based more on the ACS's competitive goals than on any desire to convey information. This is not to say that medical societies always, or even often, use their statements to influence competition without regard to truth. The point

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and (2) they could not receive additional non-periodontal care from society members, denying them the benefits of one-stop dental service. *Id.* at 1493-94. Thus the harm in *Kreuzer* was caused by the effects of the society's rule on the choices of periodontists, not by the effect of the rule on patient demand, which is the focus of this Article.

56. *Koefoot*, 610 F. Supp. at 1305 (quoting the director of the ACS).

57. *Id.* at 1303.

58. *Id.*

59. *See* Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1494 (D.C. Cir. 1984). This case is described in note 55 *supra*.

is simply that society statements do have competitive effects and that, in cases like *Koefoot*, those effects can be produced in the absence of any objective support for the statements. The next section describes another avenue for society action affecting competition.

B. The Effects of Standards on Third-Party Payers

Schachar v. American Academy of Ophthalmology, Inc.[60] involved a new ophthalmological procedure known as radial keratotomy.[61] The incidents that gave rise to the case began in 1976.[62] In that year, Dr. Leo Bores visited the Soviet Union and performed several radial keratotomies; he returned the following year to examine his patients. He performed the first radial keratotomy in the United States in 1978, and in 1979 he formed, with seven other eye surgeons, the National Radial Keratotomy Study Group (NRKSG). The NRKSG developed a protocol for use in performing the procedure and created a detailed informed consent form to be reviewed by patients undergoing the procedure.[63]

In March, 1980, Dr. George Waring joined the NRKSG. Later that month, Dr. Waring convened a meeting of a different group of fourteen eye surgeons to discuss radial keratotomy and the possibility of getting a government grant to study the procedure. Dr. Waring then contacted Dr. Ronald Geller of the National Advisory Eye Council (NAEC), an

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60. 1988-1 Trade Cases (CCH) ¶ 67,986 (N.D. Ill.). Some of the factual history related in the text comes from Vest v. Waring, 565 F. Supp. 674 (N.D. Ga. 1983), another case involving many of the same parties and issues. Although some of the facts presented here might therefore not have been before the court in *Schachar*, they are given to provide a more complete story, and because they do not change the analysis of the issues involved.

61. Radial keratotomy is a surgical procedure for the correction of nearsightedness. Nearsightedness occurs where the cornea focuses visual images in front of the retina rather than exactly on it, which results in an out-of-focus retinal image. Radial keratotomy corrects this problem by making shallow incisions radially on the surface of the cornea, which causes it to flatten slightly. The flatter cornea focuses images farther back in the eye, so vision is improved.

The procedure has had mixed results. *See* Jane E. Brody, *Study Cites Risks in an Operation for Myopia*, N.Y. TIMES, Feb. 23, 1990, at A20, col. 1 (noting that some patients receive undercorrection or overcorrection, and that ophthalmologists disagree regarding the effectiveness of the procedure). *See also* George O. Waring III *et al.*, *Results of the Prospective Evaluation of Radial Keratotomy (PERK) Study 4 Years After Surgery for Myopia*, 263 J. A.M.A. 1083 (1990); Perry S. Binder, *Radial Keratotomy in the 1990s and the PERK Study*, 263 J. A.M.A. 1127 (1990).

62. *See generally Schachar*, 1988-1 Trade Cases (CCH) ¶ 67,986, at 58,050-51; *Vest*, 565 F. Supp. at 676-83.

63. *Vest*, 565 F. Supp. at 677.

advisory committee[64] for the National Eye Institute (NEI), which provides federal funding for vision research. Dr. Geller indicated that the NEI was interested in funding research in radial keratotomy, and Dr. Waring's group met again in May to make plans for submitting a proposal for a study called the Prospective Evaluation of Radial Keratotomy (PERK).

Shortly after that May meeting the NAEC issued a statement that "[t]he Council considers radial keratotomy to be an experimental procedure because it has not been subjected to adequate scientific evaluation in animals and humans."[65] The issuing of the NAEC statement was followed by similar statements[66] from ophthalmological and medical associations in several states,[67] orchestrated, the plaintiffs alleged, by

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64. Federal advisory committees are governed by the Federal Advisory Committee Act, 5 U.S.C. App. 2. Such committees, though nominally public agencies, may themselves put private interests over those of the public. *See* Sidney A. Shapiro, *Public Accountability of Advisory Committees*, 1 RISK ISSUES IN HEALTH & SAFETY 189 (1990).

65. *Vest*, 565 F. Supp. at 678 n.6.

66. In this Article, the terms "standard" and "statement" are used, for the most part, interchangeably. Because the "statements" discussed are official communications of the societies involved, any technical differences that might exist between the two terms are not relevant here.

67. *Vest*, 565 F. Supp. at 679-80 n.8 (Georgia), 680 n.9 (New Mexico), 680-81 n.10 (Florida), 681 n.11 (Arizona). Following is the Arizona statement:

> RESOLVED, that,
>
> 1. The Arizona Ophthalmological Society (AOS), a group of physicians primarily concerned with eye care, expresses their concern about potential widespread [*sic*] adoption of an operation intended to correct nearsightedness, a common condition that can be easily and safely corrected by the use of eyeglasses or contact lenses.
>
> 2. The operation called Radial Keratotomy has received widespread publicity during the last two years. It involves cutting the cornea with a series of deep incisions that extend from the sclera toward, but not into, the center of the cornea. The incisions are intended to be deep enough so that internal eye pressure causes the edge of the cornea to bulge slightly, thereby flattening the central portion of the cornea which improves focusing. The incisions result in permanent scars.
>
> 3. The AOS considers Radial Keratotomy to be an "experimental" procedure because it has not been subjected to adequate scientific evaluation in animals and humans.
>
> 4. The AOS endorses the conclusions of the National Keratotomy Workshop of March 15, 1980; and the National Advisory Eye Council (NAEC) Resolution approved May 29, 1980, concerning Radial Keratotomy.
>
> 5. The AOS urges restraint on the part of both Arizona Ophthalmologists and patients regarding the procedure until results of research known as the Prospective Evaluation of Radial Keratotomy (PERK) study of the National Eye Institute (NEI) are obtained and fully evaluated.
>
> 6. The AOS urges that its view on the subject of Radial Keratotomy as

the American Academy of Ophthalmology.[68] All of them, purportedly following the NAEC, declared radial keratotomy to be "experimental."[69] In addition, despite the fact that some of the statements were issued *before* any PERK grants were awarded, they condemned in various terms the performance of radial keratotomy outside the confines of the PERK study. For example, the Georgia motion said that "[e]ach member of the [Georgia Ophthalmological] Society in good standing will agree to refrain from participating in such surgery outside the framework of [the PERK] study, for a period of one year, or until results indicate the technique is safe and effective."[70] The original Florida statement was nearly identical to the Georgia one, but it was later withdrawn, and a somewhat less restrictive statement substituted. The new statement, tellingly, included the NRKSG study among the approved programs.[71]

The plaintiffs alleged that the statements issued by the societies decreased demand for radial keratotomies. It was not clear in this case, however, whether the decrease was caused by reduced demand from the patients themselves or by less willingness on the part of their insurers to pay for the procedure.[72] There was no specific evidence reported in the cases regarding whether patients were discouraged from seeking the services.[73] It is clear, though, that the *intent* of the societies' statements was to discourage patients from seeking the procedure, at

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expressed in this resolution be announced to the general public, other health care professionals, institutions, including institutional review committees, and third party insurers and payers in Arizona; therefore be it

RESOLVED,

That the Arizona Medical Association endorses and supports the resolution of the Arizona Ophthalmological Society concerning the procedure known as Radial Keratotomy until the safety and efficacy of the procedure have been carefully demonstrated in controlled studies.

Id. at 681 n.11.

68. *Schachar*, 1988-1 Trade Cases (CCH) ¶ 67,986, at 58,050-51.

69. *Vest*, 565 F. Supp. at 679-80 n.8, 680 n.9, 680-81 n.10, 681 n.11.

70. *Id.* at 680 n.8.

71. *Id.* at 680-81 n.10.

72. Indeed, in *Vest* the plaintiffs included potential patients who wanted to receive radial keratotomies, but were hindered in doing so by the societies' statements. *Id.* at 682.

73. However, the notice issued in *Vest* when a settlement agreement was reached in the case notes that one of the conditions of settlement was that Dr. Waring would issue a statement that radial keratotomy was no longer "experimental" and that "[p]laintiffs also anticipate that the statement will encourage public employers to accept applicants who have had the procedure performed on them." Vest v. Waring, No. C82-325A, Revised Notice to Class Members, at 2 (N.D. Ga. Mar. 25, 1985). Apparently, then, some of those employers had been unwilling to hire patients who had received radial keratotomies, due at least in part to the societies' statements regarding the procedure.

least outside of the PERK study.[74] The statements explicitly said that they were intended to "be announced to the general public."[75] Moreover, the statements' use of dramatic, if not inflammatory, language[76] could only have been directed at the public.

But most of the reduced patient demand for radial keratotomies in *Schachar* was apparently caused by decisions by third-party payers not to reimburse for the procedure.[77] After the NAEC and the state medical societies issued their statements, several insurance companies made such decisions.[78] The plaintiffs alleged that the American Academy of Ophthalmology was instrumental in causing insurance companies to take that action.[79] It accomplished this, the plaintiffs claimed, through its membership in the Council of Medical Specialty Societies (CMSS), which is associated with the Health Insurance Association of America (HIAA). The HIAA is an organization of insurance companies which together account for approximately eighty-five percent of health insurance in the United States.[80] When the academy classified radial keratotomy as experimental, the CMSS transmitted that information to the HIAA through a newsletter under a heading entitled "Procedures Which Should Not Be Reimbursed Routinely by Third Party Payers Without Written Justification."[81] Insurers apparently followed this instruction.[82]

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74. The goal of the PERK group was not to eliminate radial keratotomy altogether, but only to confine its practice to their study. They were not, therefore, intending to convey the message that radial keratotomy was *un*safe, but only that its safety and effectiveness were unproven and, further, were only appropriately tested in their study. Even this, however, was questionable. There was no evidence that the PERK group provided better care or more useful research than the NRKSG (Dr. Bores's group). As mentioned above, the NRKSG had developed and implemented its own research protocol. See *supra* text accompanying note 63.

75. *E.g.*, *Vest*, 565 F. Supp. at 681 n.11.

76. This sort of evaluation is necessarily subjective, but to express "concern" about an "experimental" procedure that involves "deep incisions" into the cornea, resulting in "permanent scars," though perhaps not technically inaccurate, seems calculated more to alarm than to inform. This is especially so in light of the absence, discussed in the text, of efforts to place the statements in any objective context. For the full text of the statement including these descriptions, see note 67 *supra*.

77. This result is not unique to the medical field. In the industrial area, a product's failure to meet a standard can also result in third-party insurers' unwillingness to provide insurance where the product is used. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 495-96 (1988).

78. *Vest*, 565 F. Supp. at 681-82.

79. *Schachar*, 1988-1 Trade Cases (CCH) ¶ 67,986, at 58,051.

80. *Id.*

81. *Id.*

82. In addition, the case reports that some hospitals do not allow "experimental"

The adoption by insurers of medical society decisions on these matters is not surprising. Both private[83] and public[84] insurers rely heavily on medical society assessments of services. The societies are generally consulted in determining whether a given service should be covered by the patient's policy, which most often excludes procedures that are "experimental."[85] As described above,[86] the state medical societies ap-

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procedures to be performed in their operating rooms, so that after the statements were issued surgeons were no longer permitted to perform radial keratotomy in those hospitals' operating rooms. *Vest*, 565 F. Supp. at 682. This made the purchase of personal surgical equipment necessary for those surgeons who wished to continue performing the surgery. *Id.* Hospitals are not, of course, third-party payers, but the effects of their actions were in some ways analogous to the payers' actions. The increased costs incurred by the affected physicians would have resulted in higher costs to their patients, as did third-party payers' decisions not to reimburse for the procedure. The higher costs would have reduced the affected physicians' output of radial keratotomies, benefiting their competitors. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. (Papers & Proceedings) 267 (1983). Moreover, the hospitals apparently directly accepted the societies' evaluations of the procedure in much the same was as did third-party payers, as discussed in this section and section III.B *infra*.

83. *See* INSTITUTE OF MEDICINE, ASSESSING MEDICAL TECHNOLOGIES 2 (1985) ("Blue Cross and Blue Shield Association and other major insurers increasingly seek assistance from medical associations such as the American College of Physicians, the American College of Radiology, and the American College of Surgeons in formulating coverage policies.").

84. *See* Health Care Financing Administration, Medicare Programs; Criteria and Procedures for Making Medical Services Coverage Decisions That Relate to Health Care Technology, 54 Fed. Reg. 4302, 4311 (1989) (Medicare coverage decisions by private contractors "are usually made in consultation with the contractor's own medical staff and local medical specialty groups.").

85. A typical coverage provision excludes "'[a]ny treatment or procedure, medical or surgical, or any facilities, drugs, drug usage, equipment, or supplies which are Experimental or Investigative.'" Thomas v. Gulf Health Plan, Inc., 688 F. Supp. 590, 593 n.2 (S.D. Ala. 1988) (quoting coverage exclusion). Medicare coverage has similar limitations, derived from the Social Security Act's requirement that a covered procedure be "reasonable and necessary." *See* 42 U.S.C. § 1395y(a)(1)(A). The Department of Health and Human Services's Health Care Financing Administration has interpreted this requirement to mean that a procedure must be (1) safe and effective, (2) not experimental or investigational, and (3) appropriate. Health Care Financing Administration, Medicare Programs; Criteria and Procedures for Making Medical Services Coverage Decisions That Relate to Health Care Technology, 54 Fed. Reg. 4302, 4307 (1989). Under this test, a procedure's experimental status would presumably be sufficient in itself to preclude its coverage, but an experimental procedure is also unlikely to satisfy the other two criteria, given their close interdependence. *See* INSTITUTE OF MEDICINE, ASSESSING MEDICAL TECHNOLOGIES 5 (1985) ("Safety and effectiveness are addressed only indirectly in some evaluations; payers generally rely on a determination of a technology's diffusion, i.e., whether it is standard practice rather than experimental or investigative, as an indicant of a physician's judgment of its

plied this label to radial keratotomy, which caused insurers to refuse to reimburse for it. There is reason to think that professional societies should not be permitted to exercise such power.

A basic problem is that there is no objective definition of "experimental." The Health Care Financing Administration has proposed regulatory guidelines for evaluating a treatment's experimental status, but to the extent that they are not circular,[87] they rely on general acceptance by the medical community.[88] Therefore, the evaluation is an imprecise process, and determination of which procedures are experimental has been extremely inconsistent, even in the presumably impartial forum of the court system.[89] Even more significantly, the use of acceptance by the medical community as the evaluation criterion has inherent problems when it is a subgroup of that same community that is making the evaluation and that subgroup has an economic interest in the outcome.

The evaluation of radial keratotomy in *Schachar*, made by the medical societies and allegedly influenced by the PERK group, was a self-interested one.[90] Recall that the effect of the societies' efforts was

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safety and effectiveness."); Health Care Financing Administration, Medicare Programs; Criteria and Procedures for Making Medical Services Coverage Decisions That Relate to Health Care Technology, 54 Fed. Reg. 4302, 4308 (1989) ("Among the many relevant considerations [in evaluating appropriateness], safety and effectiveness are the key factors for our review.").

86. *See supra* text accompanying notes 65-69 & 77-82.

87. *See* Health Care Financing Administration, Medicare Programs; Criteria and Procedures for Making Medical Services Coverage Decisions That Relate to Health Care Technology, 54 Fed. Reg. 4302, 4316 (1989) ("'Experimental' means a technology that should be confined to a research setting under which human or animal subjects are assigned, in accordance with predetermined rules.").

88. *See id.* at 4307-08 ("Has the service been generally accepted by the medical community, and has it emerged from the research stage?").

89. *See* Richard S. Saver, Note, *Reimbursing New Technologies: Why Are the Courts Judging Experimental Medicine?*, 44 STAN. L. REV. 1095, 1098-1104 (1992).

90. The court outlined the plaintiffs' description of the process as follows:

> The Academy commissioned its Eye Banks Committee to determine the status of radial keratotomy, although the committee members were unqualified to do so, and it declared the procedure experimental. In March of 1980 at the Academy's direction various co-conspirators held a meeting at the Atlanta airport and also concluded that radial keratotomy should be designated experimental. Defendants then began a national campaign to pressure state and local medical societies, governmental agencies and hospital staffs to declare a moratorium on radial keratotomy until self-appointed academicians could study the procedure and decide whether it should be approved.

Schachar, 1988-1 Trade Cases (CCH) ¶ 67,986, at 58,050-51.

There is some indication that the evaluations of radial keratotomy were not based solely on scientific considerations. The NAEC first declared radial keratotomy experimental

not to halt the practice of radial keratotomy, but to reserve the practice of it, even in research, to the PERK group's academic studies.[91] This was true despite the absence of any showing of a significant difference between the PERK study and Dr. Bores's (non-academic) NRKSG work. As described above,[92] Dr. Bores's NRKSG was not performing radial keratotomies indiscriminately, but had itself established a research protocol for the procedure. There was no showing, or even any allegation, that the NRKSG was performing radial keratotomies irresponsibly. The main difference between its work and that of the PERK study was apparently that the NRKSG's patients paid for the procedure, while patients in the PERK study did not. Although the ophthalmologists in the NRKSG therefore stood to gain from performance of the procedure, and thus had an economic interest at stake, so did the PERK ophthalmologists.[93] Dr. Waring and the other ophthalmologists in the study were compensated for their work as part of the grant.[94] Moreover, even if they had not been paid, the receiving of a grant has significant implications for career advancement for an academic researcher. There-

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in August, 1979. Vest v. Waring, 565 F. Supp. 674, 677 n.3 (N.D. Ga. 1983). At that time the NAEC stated that "[n]o clinical research employing refractive keratoplasty [*i.e.*, radial keratotomy] should be supported by the National Eye Institute (NEI) until the results of animal research can be evaluated." *See* 18 *Investigative Ophthalmology and Visual Science* 882 (1979). However, on May 28, 1980, shortly after the meeting between Dr. Waring's study group and Dr. Ronald Geller of the NAEC, the Council changed its opinion and "urged the [National Eye Institute] to 'take whatever measures are necessary to encourage research in radial keratotomy . . . in scientifically designed clinical trials conducted by qualified investigators.'" *See Vest*, 565 F. Supp. at 678. The turnaround just as the PERK group was lobbying the NAEC for a research grant seems more than coincidental.

It is also notable that Dr. Waring himself eventually decided that he could approve radial keratotomy as part of a settlement agreement in *Vest*. The settlement notice included the following statements:

> [O]ne of the Defendants, Dr. George O. Waring, has agreed to issue a statement which will be released when the proposed settlement becomes final. The statement is intended to set forth certain current and historical facts about the radial keratotomy procedure, and states, inter alia[,] that enough information is now available to establish that radial keratotomy is not an experimental procedure.

Vest v. Waring, No. C82-325A, Revised Notice to Class Members, at 2 (N.D. Ga. Mar. 25, 1985).

91. *See supra* text accompanying notes 70-71.

92. *See supra* text accompanying note 63.

93. The third-party payers also have economic interests in the evaluations. Because insurance companies usually receive payment *per capita*, they have every reason *not* to cover a service if they can justify non-payment. Therefore, any effort by a society to persuade an insurer to eliminate reimbursement is likely to be readily accepted.

94. They probably continued to receive their paychecks from academic institutions, of course. But research grants typically include compensation for the researchers, paid to institutions for their benefit.

fore, it was in the PERK group members' economic interests to establish that radial keratotomy was experimental before widespread practice of the procedure provided data regarding its efficacy; otherwise, there would have been no need for their study. Furthermore, establishing the societies' rules that no radial keratotomies should be performed outside their study assured the PERK group of patients who might otherwise have preferred to receive the procedure without the additional burden of the experimental procedure.[95]

Thus, as in *Koefoot*, the defendants in *Schachar* were able to use the influence of their medical societies to injure the practices of their competitors. Again, as with *Koefoot*, it should be emphasized that this is not to say that the medical society evaluations were necessarily wrong. And even if they were, it is not to say that any members of either of the radial keratotomy study groups intentionally made false statements regarding the procedure. The point is only that the economic interests of the participants and the potential for effects on competition argue for a critical analysis of the society statements. The next two Parts of this Article provide a framework for that analysis.

II. Current Legal Standards

The facts in *Koefoot* and *Schachar* appear to make *prima facie* cases of combinations to restrain trade. Both trial judges thought so and denied the defendants' motions for summary judgment.[96] Nevertheless, in both cases the juries found for the defendants.[97] Although this may truly indicate that the societies' actions were, on balance, procompetitive, the economic incentives and anticompetitive potential discussed in Part I suggest that other possibilities should be considered. One is that the juries might have deferred to the professionals' justifications for their actions more readily than they would have for other groups. This possibility seems plausible when one considers that juries have returned plaintiffs' verdicts against non-professional trade associations in somewhat similar cases.[98] However, another possibility is that the medical societies received deference not from the juries but from the courts. *Koefoot* and *Schachar* may have had jury instructions

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95. *See* Havighurst, *supra* note 18, at 370 (discussing denial of consumer choice in conduct of clinical trials).

96. *Schachar*, 1988-1 Trade Cases (CCH) ¶ 67,986; *Vest*, 565 F. Supp. 674.

97. *See* Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 398 (7th Cir. 1989) (noting jury verdict for defendants); Koefoot v. American College of Surgeons, 692 F. Supp. 843, 845 (N.D. Ill. 1988) (same).

98. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 497-98 (1988) (noting jury verdict for plaintiff); American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 565 (1982) (same).

similar to those in *Wilk v. American Medical Association*,[99] another society standard case that produced a jury verdict for defendants. Those instructions could not "be defended successfully as an adequate approximation of a rule of reason test geared simply, clearly, and exclusively to the question whether the challenged conduct promoted or suppressed competition."[100]

Support for this explanation can be found in the opinion of the Seventh Circuit affirming the verdict in *Schachar*. This opinion, by Judge Easterbrook, sounded two notes often heard in professional society cases:

> [The Academy] did not require its members to desist from performing [radial keratotomies] or associating with those who do. It did not expel or discipline or even scowl at members who performed radial keratotomies.[101]
>
> An organization's towering reputation does not reduce its freedom to speak out. Speech informed, hence affected, demand for radial keratotomy, but the plaintiffs had no entitlement to consumers' favor. The Academy's declaration affected only the demand side of the market, and then only by appealing to consumers' (and third-party payors') better judgment. If such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas.[102]

If the trial courts gave jury instructions in line with these statements, it is not surprising that the juries decided for the defendants. As Judge Easterbrook points out, the Academy in *Schachar* did not force its members or others to cease providing radial keratotomies. Instead, it and the ACS in *Koefoot* were able to influence patients and third-party payers to cease buying the services they disapproved. Contrary to Judge Easterbrook's view, however, that should not remove the societies' actions from the reach of the antitrust laws.[103]

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99. 719 F.2d 207, 211 (7th Cir. 1983) (noting jury verdict for defendants), *cert. denied*, 467 U.S. 1210 (1984). *Wilk* was subsequently retried (on a more limited set of issues) without a jury, and the trial judge found for the plaintiff. *See* Wilk v. American Medical Ass'n, 671 F. Supp. 1465 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 476 U.S. 927 (1990).

100. *Id.* at 225. In contrast, the Supreme Court in *Allied Tube* specifically noted that "[t]he jury, instructed under the rule of reason that respondent carried the burden of showing that the anticompetitive effects of petitioners's actions outweighed any procompetitive benefits of standard setting, found petitioner liable." 486 U.S. at 497-98.

101. *Schachar*, 870 F.2d at 398.

102. *Id.* at 399-400.

103. Even commentators who are generally sympathetic to society standard-setting

A. Anticompetitive Effects on Demand

As a preliminary matter, it is clear that some medical standards, such as the one in *Koefoot*, do have a coercive effect. Although Dr. Koefoot did not give up his practice of what the ACS called "itinerant surgery," he was thereby forced to give up his ACS membership.[104] It would be a cramped definition of coercion that excluded a rule with effects like these from its reach. "Coercion" is present not only when the society member has no choice at all, but also when the society exercises some degree of undue influence.[105]

In any event, the view that coercion is necessary to establish an antitrust violation is simply wrong. In *Schachar*, Judge Easterbrook cited several trade association cases in which standards were found anticompetitive, and he said that in those cases the standard was enforced.[106] However, his characterization of those cases was at best disingenuous. Several of the cases cited involved only standard-setting, not enforcement, or explicitly said that coercion was not necessary to find a violation.[107]

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have expressed skepticism about Judge Easterbrook's comments. *See* Greaney, *supra* note 19, at 663 ("The Seventh Circuit's dismissive analysis of [Schachar's] antitrust claim is questionable . . . .")

104. *See* Koefoot v. American College of Surgeons, 610 F. Supp. 1298, 1303 (N.D. Ill. 1985) (The ACS stated that "[i]f Dr. Koefoot chooses not to drive 20 miles to [plaintiff hospitals] to see his patients, if Dr. Koefoot disagrees with the College's policy, or if Dr. Koefoot chooses to spend his time on pursuits other than surgery, that is his perfect right. But he may not call himself a Fellow of the American College of Surgeons."). *See supra* section I.A.

105. A standard that operated much like the one in *Koefoot* was at issue in Wilk v. American Medical Ass'n, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984), *decision on remand*, 671 F. Supp. 1465 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990). The AMA's standard prohibited its members from practicing in association with chiropractors. 719 F.2d at 213-14. Although, as in *Koefoot*, an AMA member physician need only have left the society to practice as she liked, the *Wilk* court had no difficulty finding a coercive effect. On remand, it enjoined the AMA from "restricting, regulating or impeding, or aiding and abetting others from restricting, regulating or impeding, the freedom of any AMA member or any institution or hospital to make an individual decision as to whether or not [to] professionally associate with chiropractors." 671 F. Supp. at 1507.

106. *Schachar*, 870 F.2d at 399 (citing National Soc'y of Professional Eng'rs, Inc. v. United States, 435 U.S. 679 (1978); Wilk v. American Medical Ass'n, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984); Moore v. Boating Indus. Ass'ns, 819 F.2d 693 (7th Cir. 1987); Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118, 124-27 (2d Cir. 1980), *aff'd on other grounds*, 456 U.S. 556 (1982); Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 946-47 (2d Cir. 1987), *aff'd on other grounds*, 486 U.S. 492, 499 n.3 (1988)).

107. *See, e.g.*, American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 559 (1982) ("These codes, while only advisory, have a powerful influence . . . ."); Wilk v. American Medical Ass'n, 719 F.2d 207, 230 (7th Cir. 1983) ("[E]ven without

Moreover, the Supreme Court has repeatedly found antitrust violations by professional societies in the absence of coercive enforcement, so it is clear that antitrust liability does not require that there be any formal enforcement mechanism.[108] It is true that the Court has also said that "[c]oncerted efforts to *enforce* (rather than just agree upon) private product standards face more rigorous antitrust scrutiny."[109] But this merely indicates that the mechanism by which standards act is relevant; it does not suggest that the Court would exempt from scrutiny standards that lack formal enforcement. Thus, neither the antitrust laws nor the Supreme Court's interpretation of those laws imposes a requirement that a restraint of trade be formally coercive. It is the practical effects of a standard that matter.[110]

Actually, this seems to be acknowledged in *Schachar*. After Judge Easterbrook's rhetorical flourish regarding coercion, he evaluated whether the Academy's action produced anticompetitive effects. As evidence of

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coercive enforcement, a court may find that members of an association promulgating guidelines sanctioning conduct in violation of § 1 participated in an agreement to engage in an illegal refusal to deal."), *cert. denied*, 467 U.S. 1210 (1984); *see also* United States v. National Soc'y of Professional Eng'rs, Inc., 389 F. Supp. 1193, 1200 (D.D.C. 1974) (stating that the society "actively pursue[d] a course of policing adherence" to its ban on competitive bidding, but referring only to "educational campaigns and personal admonitions to members and clients"), *aff'd in part, modified in part on other grounds*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978). In addition, Judge Easterbrook described the enforcement mechanism in *Allied Tube* as an agreement "not to manufacture, distribute, or purchase certain types of products." *Schachar*, 870 F.2d at 399 (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988)). But no evidence was offered in *Allied Tube* of any efforts to enforce such an agreement. A competitor was free to manufacture any product it chose; it would just be unable to sell it due to the established standard labelling it unacceptable. The situation is thus exactly analogous to that in *Schachar*, where the resolutions of the medical societies required members to "'refrain from participating in [radial keratotomies] outside the framework of [the PERK study].'" Vest v. Waring, 565 F. Supp. 674, 680 n.9 (N.D. Ga. 1983) (quoting resolution of the New Mexico Ophthalmological Society).

108. For example, the defendant bar association in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), set fee standards that it argued were voluntary, so that there was no real price-fixing. *Id.* at 781. But the Court responded that the standards presented not only the threat of professional discipline but "the desire of attorneys to comply with announced professional norms." *Id.* (citation omitted). Thus, the Court seemed to say that any norm issued by a professional society would be a restraint that could create antitrust liability, merely because the society's members tended to follow it.

109. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 n.6 (1988) (citations omitted, emphasis in original).

110. *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2082 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" (citations omitted)).

a lack of such effects, he pointed out that radial keratotomies continued to be performed. But this point is hardly conclusive. The Sherman Act proscribes not just total elimination of trade, but all unreasonable restraint of trade.[111] In fact, the court went on to discuss the number of radial keratotomies that were performed, indicating that it acknowledged the number's relevance. It should, therefore, have considered the extent, if any, of the reduction in the number of radial keratotomies performed.[112] Reduced output is what antitrust law is all about.

B. Medical Society Power in the Market for Information

The misplaced emphasis on coercion is a result of a misconception regarding the nature of medical societies' market power. Coercion of society members is a product of the power of societies to grant or deny membership. If a society, as in *Koefoot*, denied membership to those who did not conform to its standards, it might be able to force its members to conform. It is true that some society power is of this kind and derives from the importance to individual professionals of society membership. Membership provides a source of referrals,[113] and it may be useful for marketing one's services. It may even be necessary to qualify for staff privileges in a hospital.[114] But it is not this sort of power in the professional employment market that is reflected in *Schachar* and to a large extent in *Koefoot*.

In those cases, competitive effects were produced by society influence over third parties, i.e., patients and insurers, rather than society members. That influence was produced by the evaluations communicated in the societies' statements: in *Koefoot*, labelling itinerant surgery "unethical,"[115] and in *Schachar*, labelling radial keratotomy "experimental" and saying it should not be performed outside a particular research study.[116]

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111. *See supra* note 9.

112. That was the approach taken by the Supreme Court in *Goldfarb*, where it pointed out that every lawyer that the petitioners had contacted had adhered to the fee schedule, which it said "reveal[ed] a situation quite different from what would occur under a purely advisory fee schedule." *Goldfarb*, 421 U.S. at 781. Thus, the Court expressed its willingness to rely on the effects of a society's standards as evidence of their coercive power. It made this approach more explicit in FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986), where it noted the FTC's finding that the federation's restrictions were adhered to by its members and said that those effects were "legally sufficient to support a finding that the challenged restraint was unreasonable." *Id.* at 461.

113. Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1484 (D.C. Cir. 1984).

114. Koefoot v. American College of Surgeons, 610 F. Supp. 1298, 1301 (N.D. Ill. 1985).

115. *See supra* section I.A.

116. *See supra* section I.B.

In a very real sense, therefore, the societies' influence was caused by their power in a market for medical information.[117] Although neither consumers nor (usually) third-party payers actually purchase medical information directly, both actively seek it out. Professional societies willingly respond by supplying this information. Indeed, professional societies are major suppliers in the medical information market.[118] For better or worse, their prominent positions in their fields, and the respect and esteem in which they are held, give them power in that market.[119] Moreover, it is difficult for new entrants to attain comparable positions in order to provide alternative views regarding medical services.[120]

As was made clear in *Koefoot* and *Schachar*, the medical information market has strong effects on the medical services market. The exact mechanism of these effects can be described in any of several ways,[121]

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117. The same observation has been made in the context of medical credentials and accreditation: "The key to the analysis—and the shortest and surest path to sensible legal results—is recognition that a market for commercially valuable information and opinion exists and can be kept competitive by applying traditional antitrust principles to those participating in it." Havighurst & King, *supra* note 4 (pt. 2), at 334. *See also* Howard Beales, Richard Craswell, & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J. L. & ECON. 491, 505 (1981) ("When scale economies in information generation and dissemination lead to natural monopoly problems, information intermediaries can achieve a high level of market power, though it may not be exercised in practice.").

118. *See* Havighurst, *supra* note 18, at 350 ("Much of the privately generated information concerning medical technology emanates from professionals and professional organizations.").

119. *See, e.g.*, Schachar v. American Academy of Ophthalmology, Inc., 1988-1 Trade Cases (CCH) ¶ 67,986, at 58,052 (N.D. Ill.) ("The views of [a large and highly respected professional] organization specializing in a field about which the general public is generally uninformed, especially where the views are publically disseminated to potential patients and third party payers, acquire significantly more weight and thus have a more coercive effect than would the views of individuals.").

120. *See* Havighurst, *supra* note 18, at 350 ("Because of the difficulties of marketing public goods . . . , private technology assessment is more likely to be undertaken by large organizations that can themselves internalize enough of the benefit to justify the cost.").

121. For example, one can look at the effect of standards from the perspective of purchasers of medical services. For such a group, standards greatly affect information costs. *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2085-87 (1992) (discussing effects of information costs generally). The relative availability of information regarding different medical services, and the nature of that information, will be largely a function of the standards and statements that have been issued regarding those services. Therefore, because information about medical services is difficult and costly to obtain, when a standard is available it is likely to be the only information a consumer will use. *See id.* at 2086 ("[E]ven if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive.").

Imposing liability on competitors who worsen this problem has been considered. In Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468 (3d Cir.

but the important point is that information (or misinformation) conveyed

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1992), *cert. denied*, 113 S. Ct. 196 (1992), the plaintiff argued that Chrysler's policy of requiring consumers to purchase radios with its cars allowed it to include part of the price of the radios in the base price of the car, thus misleading consumers regarding the price that they were paying for the radios. The court agreed that "[a]ctions creating or exacerbating problems of imperfect information could be seen as 'restraining trade' or 'substantially lessening competition' even though not leading to monopoly or oligopoly." *Id.* at 492 n.34. The court also noted that some comments in the Supreme Court's opinion in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), might justify such a view. 959 F.2d at 490-92. But it declined to consider that option itself, "absent a much clearer mandate from the Court." *Id.* at 492. *Kodak* may be that mandate. In any event, Chrysler's actions in *Town Sound* were not specifically directed at conveying information. In professional standard-setting, where informing others is the goal of the actions at issue, more searching scrutiny is appropriate.

Alternatively, one can look at the costs of the suppliers who compete with standard-setters. Although in principle it is possible for competing suppliers to correct misleading information conveyed by a standard, so as to recover the demand of consumers, it may be prohibitively expensive to do so. *See Kodak*, 112 S. Ct. at 2086 n.21 ("Even in a market with many sellers, any one competitor may not have sufficient incentive to inform consumers because the increased patronage attributable to the corrected consumer beliefs will be shared among other competitors." (citation omitted)). And even if a supplier did expend the resources to compete against a misleading standard, doing so would raise his costs, and, therefore, disadvantage him in competition. This occurred in Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). The defendant in *Interstate Circuit*, a monopoly operator of first-run movie theaters, prevailed upon a distributor to require second-run theaters to charge a minimum price. *Id.* at 215-18. As Professors Krattenmaker and Salop point out, the effect of this action was to raise the costs of the second-run theaters: "The price that theaters paid for exhibition rights did not necessarily rise but, presumably, their costs of attracting patrons did." Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 239 n.97 (1986). The necessity of competing with a deceptive standard imposes similar additional costs on competitors of the standard-setters. Professors Krattenmaker and Salop note that under these circumstances the theory that monopoly power in one market (*i.e.*, medical information) can be "leveraged" into another (*i.e.*, medical services) is plausible. *Id.* at 248-49.

Interestingly, both of these mechanisms were discussed in a recent article on professional rules, yet the author of that article had little concern regarding the demand-related effects described here. *See* John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 SAN DIEGO L. REV. 301 (1991). Professor Lopatka describes, in a discussion emphasizing economic theory, how restrictions in the supply of information can both increase consumer search costs, *id.* at 317-23, and raise the costs of providers, *id.* at 323-32. He further notes the parallels between these two phenomena and observes, as does this Article, that "[t]he best way to view the matter may be to recognize a demand for information." *Id.* at 329. Nevertheless, when he discusses what he calls the "theoretical possibility" of a group of professionals collusively manipulating demand by establishing rules that mislead consumers, he states only that "determining that such a rule is likely to reduce welfare would be difficult." *Id.* at 333-35.

Professor Lopatka does not apply his observations on cost-raising to the manipulation of demand by professionals because he focuses only on markets defined by professional

in society standards, and the interpretation of that information by its recipients, influences the purchase of medical services. The influence is effective independent of any influence or coercion that societies impose on their members. This has two important implications. First, the cases that look at the percentage of physicians belonging to a society[122] or at the importance to a physician of belonging to a society[123] are missing the point. Those factors affect only the society's power in the market for medical society membership, not necessarily its power in the medical services market.[124] Second, and conversely, a society's power to affect

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services as a whole, rather than on particular product markets. For example, although Professor Lopatka notes that his model of increased consumer costs "depends on a change in demand, not a change in the costs of the supplies," *id.* at 321, he examines this phenomenon only in the context of the suppression of price information, an action that affects the entire professional services market. *See id.* at 318-21. Similarly, in describing the efforts of dentists who do not use dental hygienists to raise their rivals' costs by banning those rivals' use of hygienists, he notes only that "[t]he industry supply curve rotates up and to the left." *Id.* at 324. The industry focus of Professor Lopatka is confirmed by his statement dismissing the importance of professional rules affecting information: "The information restrained by such a rule might have no effect on the demand for professional services, but merely cause a shift in the pattern of supply among professionals." *Id.* at 334. But it is exactly control over the shifting of supply patterns (that is, the allocation of productive capacity) that the antitrust laws seek to prevent. *See, e.g.*, 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 103 (1978) ("The economic objective of a pro-competitive policy is to maximize consumer economic welfare through efficiency in the use and allocation of scarce resources . . . ."). A focus on an entire industry is only appropriate when the cross-elasticity of demand among the various services in that industry is high. *See generally* 2 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 525 (1978). That is, it is only appropriate when consumers perceive the services in the industry as close substitutes. *Id.* This may be the case in Professor Lopatka's examples. For instance, consumers are probably largely indifferent between dental-services-without-dental-hygienists and dental-services-with-dental-hygienists. However, in many other cases, consumers are not indifferent between professional services. In the ophthalmological area, for example, consumers do not treat even contact lenses and eyeglasses as completely interchangeable, and it is not likely that a surgical procedure like radial keratotomy would be perceived as a close substitute for either. Therefore, radial keratotomy probably constitutes an market in itself, and the effects of manipulation of demand should be assessed in that market, not in the market for ophthalmological (or, even more broadly, medical) services in general. The same anticompetitive potential that Professor Lopatka describes for entire industries also applies to individual product markets.

122. *See, e.g., Schachar*, 1988-1 Trade Cases (CCH) ¶ 67,986, at 58,050 (noting that over ninety percent of all ophthalmologists in the United States belong to the American Academy of Ophthalmologists).

123. *See supra* text accompanying notes 113-14.

124. Of course, the importance of society membership and power in the information market will often both be present when a society is prominent and well respected. But power in the information market does not derive from the importance of membership; instead, both are a result of the prominence of the society.

the consumption of medical services may be much greater, due to the esteem in which it is held or the effectiveness of publication of its statements, than its size or market share of physicians would predict.[125]

The Supreme Court has recognized exactly this sort of market power in two trade association cases. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*,[126] for example, it said that the society's "agents exercise economic power because they act with the force of the Society's reputation behind them."[127] That power derived not from influence over the members of the society, but because the Society's "codes and standards influence the policies of numerous States and cities, and, as has been said about 'so-called voluntary standards' generally, [the Society's] interpretation of its guidelines 'may result in economic prosperity or economic failure for a number businesses of all sizes throughout the country,' as well as entire segments of an industry."[128] Similarly, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[129] the Court said that it was deciding the case "on the theory 'that the stigma of not obtaining [Code] approval of its products and [the defendant's] "marketing" of that stigma caused independent marketplace harm'" to the plaintiff.[130] The "independent marketplace harm" produced by the absence of Code approval was a result of the standard's impact on third parties, not its effect on society members.[131]

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125. *Cf.* Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342, 1346-47 (9th Cir. 1987) (pointing out that although the uniqueness of Mercedes automobiles may provide market power in the consumer market, it does not necessarily do so in the dealer market for automobile franchises), *cert. denied*, 488 U.S. 870 (1988).

126. 456 U.S. 556 (1982).

127. *Id.* at 574.

128. *Id.* at 570 (quoting H.R. Rep. No. 1981, 90th Cong., 2d Sess. 75 (1968)).

129. 486 U.S. 492 (1988).

130. 486 U.S. at 498 n.2 (quoting Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 941 n.3 (2d Cir. 1987), with interpolations by Supreme Court); *see also* Koefoot v. American College of Surgeons, 610 F. Supp. 1298, 1308 (N.D. Ill. 1985) ("[T]his Court simply cannot accept the defendants' contention that any injury to Dr. Koefoot's reputation is irrelevant to his antitrust claim. To the extent that the number of patients referred to a surgeon depends on his reputation, that reputation is critically important and directly affects his income. Because Dr. Koefoot is a direct competitor of surgeons who are Fellows of the American College of Surgeons, injury to his reputation and income is precisely the sort of anti-competitive injury that the antitrust laws were designed to prevent.").

131. It should be pointed out that at another point the *Allied Tube* Court said that the effects of the code were not solely a result of the "power of persuasion." It noted that "[t]he Association's members, after all, include consumers, distributors, and manufacturers of electrical conduit, and any agreement to exclude [a particular product] from the Code is in part an implicit agreement not to trade in [the product]." 486 U.S. at 507. The presence of consumers in a trade association, when the association takes a

C. Competitive Effects in the Medical Information Market

Accepting that medical societies influence the operation of the medical services market by issuing evaluations of products and services to third parties, how does that information affect competition? Third-party payers, as discussed below,[132] present a special case because they often respond not to the information in a standard but merely to the fact of its issuance. For consumers, it is the specific statements of the society that affect their decisions. Therefore, as the Supreme Court has said in addressing this issue, it is important that "private economic decisions . . . be intelligent and well informed."[133] The focus should be on whether the information provided enables patients to make better, *i.e.*, better informed, choices of services.[134] In other words, do the medical societies provide accurate information, or do they merely (mis)lead patients to purchase the services the societies prefer?[135]

There are two ways to attempt to ensure that information flows cleanly and accurately: information can be tested for substantive content, or the generation of information can be governed by rules that ensure the integrity of the information-generating process. The Supreme Court in *Allied Tube* relied on both tests in stating its view that if private

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position disapproving a product, lends the association's action the character of a group boycott. *See* Havighurst & King, *supra* note 4 (pt. 1), at 173-74. Because professionals societies do not have patients as members, they do not share this problem.

132. *See infra* section III.B.

133. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

134. *See* Havighurst, *supra* note 18, at 350 ("[T]he issue that antitrust courts must resolve is whether professional sponsorship of technology assessment perpetuates professional dominance, thus impeding rather than promoting the movement toward a competitive market in which choices are made, with good information, by consumers and independent agents acting on their behalf.").

135. The staff of the Federal Trade Commission has described a variety of ways in which standards can be deceptive or misleading. *See* BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, STANDARDS AND CERTIFICATION: FINAL STAFF REPORT 188-209, 288-95 (1983). As described in notes 152 and 218 *infra*, the F.T.C. proposed regulations in this area, but its authority to issue such regulations was withdrawn by Congress with the comment that deceptive standards were already prohibited by the antitrust laws.

At least one court of appeals has appeared to accept this theory of competitive impact, at least in principle. In Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989), the plaintiff alleged that the form of a trade association's standard might have misled users regarding the significance of the association's approval. The court affirmed a finding of no antitrust liability because there was "no testimony that any of [the consumers] was fooled." *Id.* at 487-88. It did not, however, reject the argument that such deception could be anticompetitive. *See id.* For a similar view in a somewhat different context, see the discussion of Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 196 (1992), in note 121 *supra*.

standards are derived "based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages."[136] However, despite this statement's reference to both substantive and procedural tests, the rest of the case focused solely on the procedural protections.

Allied Tube involved the National Fire Protection Association (NFPA), which sets and publishes standards routinely adopted as law in many jurisdictions.[137] A change was proposed to a standard established by the NFPA, and the standard's supporters (most of whom were manufacturers of products that conformed to it) packed the association's annual meeting with new members recruited specifically to vote against the proposed change, which would have approved a new and competing product.[138] The change was voted down.[139] The Court said that even though the packing of the meeting did not actually violate the association's rules, and even though most of the damage to plaintiffs was done by government adoption of the NFPA's standards, the association was responsible for seeing that its power was not used in such a fashion:

> [T]he hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards.[140]

It is not clear, however, that there could ever be procedural safeguards sufficient to protect the standard-setting process from economic self-interest. The problem is especially acute in a case like *Wilk v. American Medical Association*,[141] where the American Medical Association sought to "eliminate" the practice of chiropractic, in part through enactment of an "ethical principle" that prohibited its members from practicing in association with chiropractors.[142] In that case, where the disapproved

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136. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) (citation omitted).

137. *Id.* at 495-96.

138. *Id.* at 496-97.

139. *Id.* at 497.

140. *Id.* at 509 (footnote omitted).

141. 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984), *decision on remand*, 671 F. Supp. 1465 (N.D. Ill. 1987), *aff'd* 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990).

142. Until 1980, Principle 3 of the American Medical Association (AMA) Principles

practitioners (*i.e.*, the chiropractors) were not members of the society issuing the standard, it was arguably in every society member's self-interest to pass a restrictive standard. Even when society members disagree about a standard, presumably the best that can be done is to determine whether it is preferred by a majority of society members. Enactment of such a standard would still not meet antitrust requirements, for two reasons.

First, any new practice technique adopted by professionals is introduced first by a minority of professionals. There is no reason to suppose that these innovative professionals are less able than others to determine whether the new technique is safe. To the contrary, their experience with the new technique places them in the best position to evaluate it.[143] Furthermore, it is possible, if not likely, that those professionals not yet practiced in the new technique will be suspicious of it.[144] Therefore, given the uncertainty in evaluating any medical technique, a majority (or even super-majority) vote is likely to reject most new techniques, regardless of merit.

Second, and more important, the antitrust laws do not operate by majority vote of producers, but by the market decisions of consumers. One could certainly adopt the position that, given safety concerns, new procedures should be adopted only when a majority of professionals approve them, but that is not the position adopted by the Sherman Act. The Supreme Court has never said that the choice in these matters should not remain with consumers. It is especially unlikely that the Court would allow a group of producers to decide on the proper form of services to provide to consumers. In *National Society of Professional Engineers v. United States*,[145] the Court said that, even in the absence of a professional society's quality standards, quality goods could still be produced because "a purchaser might conclude that his interest in quality—which may embrace the safety of the end product—outweighs

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of Medical Ethics provided: "A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily professionally associate with anyone who violates this principle." 719 F.2d at 231. The AMA at the time considered chiropractic unscientific, and its official interpretation of Principle 3 described it as such, so Principle 3 discouraged physicians from associating with chiropractors. *Id.*

143. This is not to say that such groups will not have their own bias, probably in favor of the new technique, or that they are the only ones who should be able to evaluate it. The point is just that, given their experience with the technique, their views are likely to be well informed and should not be permitted to be overwhelmed by the majority's less informed perceptions. To the extent that the innovators made deceptive statements regarding the technique, though, they would be liable on the same terms as the larger group (assuming that they too had market power). *See infra* section III.A.

144. *See supra* note 15.

145. 435 U.S. 679 (1978).

the advantages of achieving cost savings by pitting one competitor against another."[146] The choice, therefore, should remain with consumers. When the profession restricts the consumer's options by imposing norms for the behavior of its members, it "imposes the Society's views of the costs and benefits of competition on the entire marketplace."[147] Similarly, the Court in *FTC v. Indiana Federation of Dentists*[148] said that "[a] refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare."[149] The Court again emphasized its concern that consumers have free choice: "The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand."[150]

These statements suggest that *Allied Tube*'s emphasis on procedural protections was due more to the actions of the defendant to "'subvert' the consensus standard making process"[151] than to any unwillingness of the Court to impose substantive requirements.[152] Procompetitive standards

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146. *Id.* at 694.

147. *Id.* at 695.

148. 476 U.S. 447 (1986).

149. *Id.* at 459.

150. *Id.* at 462. The Court was actually somewhat equivocal on this question in *Indiana Federation of Dentists*. When the federation attempted to use patient care as its justification for declining to provide x-rays to insurers, the Court rejected the justification because it was unsupported by any evidence that consumers had in fact been harmed. It did not rule out a patient-care defense entirely, though, resting its decision on the facts of the case "even if concern for the quality of patient care could under some circumstances serve as a justification for a restraint of the sort imposed." *Id.* at 464. But the Court has since categorically rejected a quality-of-care argument in another case involving the medical profession (though not a professional society). In Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), the plaintiff anesthesiologist claimed that a hospital's contract with a single anesthesiology group was an illegal tie-in. The Court rejected the claim, but said in a footnote that if there had been evidence of an illegal tying arrangement, the reasons for its creation would have been irrelevant. The Court "reject[ed] the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care." *Id.* at 25 n.41.

151. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 498 (1988).

152. As described in note 218 *infra*, the staff of the Federal Trade Commission in 1978 proposed substantive rules to prevent deception of consumers by standards, but Congress withdrew the F.T.C.'s rule-making authority in this area. Following Congress's action, the F.T.C. staff issued a final rule proposal that mandated only procedural processes for complaint handling by standards organizations. *See* BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, STANDARDS AND CERTIFICATION: FINAL STAFF REPORT 339-44 (1983). In the end, even that rule was not issued, because the Commission decided to use case-by-case enforcement in situations of anticompetitive standard-setting. *See* 50 Fed. Reg. 44,971 (1985). The Commission noted that it made that decision in part because the

should therefore be required to meet a substantive test like the one expressed in that case, where the Court said that standards should be based on "objective expert judgments."[153] Only then will the standards promote, rather than hinder, the workings of the market. This test, however, immediately raises the question of a conflict between the antitrust laws and the First Amendment. Are professional societies not free, as Judge Easterbrook says,[154] to speak out regarding their services regardless of whether their statements are false or misleading? The answer, as the following section shows, is no.

D. The Antitrust Laws and Speech

The Sherman Act is, of course, subject to the limitations of the Constitution. Part of that limitation is the First Amendment's protection of freedom of speech, which must be considered in enforcing the antitrust law. But a group cannot merely point to the First Amendment to immunize speech that restrains trade:

> [I]t has never been deemed an abridgment of freedom speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.[155]

The interrelationship of the antitrust laws and the First Amendment has been explored almost exclusively in the context of "political" speech. The two areas of law have been reconciled in the development of the *Noerr-Pennington* doctrine,[156] which provides immunity from the antitrust laws for speech addressed to the government. Such speech, and other activities seeking government action, are protected even if the activities

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anticompetitive dangers presented by standards had decreased as a result of changes in standards organizations' procedures following a Supreme Court decision that imposed liability on a standard-setting society for the anticompetitive activities of its members. *Id.* The decision to which the Commission referred was presumably American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982), which is discussed in note 190 *infra*.

153. *Allied Tube*, 486 U.S. at 501.

154. *See supra* text accompanying note 102.

155. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972) (quoting Giboney v. Empire Storage Co., 336 U.S. 490, 502 (1949)).

156. The application of the *Noerr-Pennington* doctrine to society standards is discussed in more detail in section IV.C *infra*.

are motivated by an anticompetitive purpose. But even this First Amendment protection is limited, and the nature of the limitation sheds light on the permissible boundaries for standard-setting.

Noer-Pennington immunity has been held by the Supreme Court not to extend to misrepresentations or fraud, at least in forums less political than the legislature, such as the courts and administrative agencies.[157] Significantly, the Court in *Allied Tube* focused on this exception in denying *Noerr-Pennington* immunity in that case.[158] The Court reaffirmed the exception to immunity for deceptive speech before courts and administrative agencies, and even suggested, contrary to previous cases, that it might extend to some legislative bodies.[159] The Court then made clear that deceptive speech is also unprotected in the private context. It observed that because private standard-setting involves collaboration among business competitors, "the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication."[160]

Thus, *Allied Tube* shows little tolerance for deception in the standard-setting process. The Court's focus, however, was on proceedings before the standard-setting body, not on the standards as they were addressed to the public.[161] Therefore, *Allied Tube* does not necessarily show that the Court's concern for substantive accuracy extends to speech directed outside the organization.[162] As it happens, a demand for accuracy from

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157. *California Motor Transport Co.*, 404 U.S. at 510-13.

158. The defendants there argued that, because their standards were enacted into law by many local governments, their standard-setting efforts were "quasi-legislative." The Court disagreed: "That rounding up supporters is an acceptable and constitutionally protected method of influencing elections does not mean that rounding up economically interested persons to set private standards must also be protected." Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504 (1988).

159. *Id.* at 500 (citing California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512-13 (1972)); *id.* at 504 (suggesting that "misrepresentations made under oath at a legislative committee hearing" would not be protected).

160. *Id.* at 507.

161. *See supra* text accompanying notes 138-41.

162. At least one case suggests that the Court's standards for speech to the public would be at least as strict as those for speech within the organization. In *Noerr* itself, where a group of railroads were seeking legislative action to disadvantage the trucking industry, the railroads also engaged in a campaign to persuade the public to support its legislative efforts. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 142-44 (1961). The Court specifically noted though, that to the extent the truckers suffered injury as a result of the publicity campaign, the injury was only incidental to the railroads' efforts seeking legislative action. *Id.* at 143. It said that "[t]here [were] no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers." *Id.* at 142. Therefore, in a case like *Schachar*, where the societies

groups of professionals is supported by another line of Supreme Court cases that requires such accuracy from individual professionals.

Individual professionals often make advertising claims for their services not unlike the claims of professional societies. In the cases described below, such advertising claims were challenged by professional societies as violations of their codes of ethics. Because many of these professional organizations, such as bar associations, are state agencies, their restrictions on members' speech are subject to the First Amendment. That is, professional societies' rules regarding members' speech are subject to much the same limitations as is antitrust regulation of the societies' speech. Therefore, the Court's treatment of these cases should provide insight into its views on collective professional speech as well.

In applying the First Amendment to professional advertising, the Court has moved from an initially broad protection of speech to an emphasis on accuracy that recognizes the element of trade regulation in these cases.[163] The evolution began in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[164] where the Supreme Court held that the First Amendment protected the advertisement of drug prices by pharmacists. In this case, there was no question of the advertisements' accuracy, so the Court saw no reason to restrict them. It said, for example, that the state-imposed restrictions rested on the assumption that there were benefits from keeping the public in ignorance.[165] However, the Court recognized that commercial speech must be judged by its commercial impact. It said that "proper allocation of resources in a free enterprise system" depends on the flow of information about the operation of that system.[166] Accordingly, the Court said that if the state had chosen only to restrict "false or misleading" speech, the First Amendment would not have been an obstacle.[167] The majority did not

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specifically sought to influence the public not to receive radial keratotomies outside their own studies the Court would likely interpret the societies' First Amendment protections narrowly.

163. Consider, for example, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), where the Court rejected an attorney's argument that his in-person solicitation of potential clients was protected by the First Amendment. The conduct is barely acknowledged to have a speech component at all—the Court says that it is "only marginally affected with First Amendment concerns" and compares it to direct selling techniques regulated by the Federal Trade Commission. *Id.* at 459, 464-65. *See also* C. Lee Peeler & Michelle K. Rusk, *Commercial Speech and the FTC's Consumer Protection Program,* 59 ANTITRUST L. J. 985 (1991) (describing compatibility between the Supreme Court's protection of commercial speech and the FTC's prohibition of deceptive advertising).

164. 425 U.S. 748 (1976).

165. *Id.* at 769-70.

166. *Id.* at 765.

167. *Id.* at 771-72. The Court said that, given both the verifiability provided by

elaborate on this conclusion, but Justice Stewart, concurring, drew an analogy to the speech of employers in labor relations, which must "be carefully phrased on the basis of objective fact" and must avoid conscious overstatement.[168] He emphasized that when the speaker has "specific and unique knowledge of the relevant facts," she has a special obligation to avoid false or misleading speech.[169]

This concern regarding specialized knowledge came to the fore in *Bates v. State Bar of Arizona*,[170] which followed *Virginia Board of Pharmacy* in upholding advertising of routine legal services.[171] In doing so, *Bates* made some observations that are particularly relevant to professional standard-setting. Most importantly, it expressed concerns regarding claims of quality, and made clear that it would examine them closely.[172] It said, for example, that "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."[173] Two dissenting opinions would have gone further and rejected *any* First Amendment protection for the advertising, on the grounds that legal services are too individualized to be susceptible to non-misleading advertisement of prices.[174]

The implications of these statements in *Bates* are as yet unclear, because the Court has not yet addressed a case in which claims of quality have been made.[175] The closest it has come are two additional cases involving lawyer advertising, *In re R.M.J.*[176] and *Peel v. Attorney*

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the familiarity of the speaker with his product and the strong commercial motivation for it, it may be "less necessary to tolerate inaccurate statements for fear of silencing the speaker." *Id.* at 772 n.24.

168. *Id.* at 778-79 (Stewart, J., concurring) (quoting NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 618 (1969)).

169. *Id.* at 779 (Stewart, J., concurring).

170. 433 U.S. 350 (1977).

171. The Court said that the conclusion in *Bates* "might be said to flow *a fortiori*" from that in *Virginia Board of Pharmacy*. *Id.* at 365.

172. *Id.* at 366 ("[W]e need not address the peculiar problems associated with advertising claims relating to the *quality* of legal services. Such claims probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false.").

173. *Id.* at 383 (footnote omitted); *see also Virginia Board of Pharmacy*, 425 U.S. at 773 n.25.

174. 433 U.S. at 386-87 (Burger, C.J., dissenting), 389-96 (Powell, J., dissenting).

175. That is, the Court has not considered a case in which quality claims were the center of the dispute. It has, of course, considered cases in which quality was used as a justification for other society actions. *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 464 (1986); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 25 n.41 (1984); National Soc'y of Professional Eng'rs, 435 U.S. 679, 694 (1978).

176. 455 U.S. 191 (1982).

Registration and Disciplinary Commission of Illinois.[177] In *In re R.M.J.*, a lawyer had advertised that he was "Admitted to Practice Before THE UNITED STATES SUPREME COURT."[178] The Court said that the statement "could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court."[179] However, in the absence of findings in the record regarding whether the information was misleading, the Court allowed the advertising.[180]

In *Peel*, the Court had the opportunity to consider a similar issue on a more fully developed record. The petitioner had stated on his letterhead, truthfully, that he was a civil trial specialist certified by the National Board of Trial Advocacy ("NBTA"), a private group. The Illinois attorney disciplinary commission found the advertisement to be a violation of the state's code of professional responsibility, which prohibited an attorney from advertising himself as "certified" or as a "specialist." The Illinois Supreme Court adopted the commission's conclusion. The plurality opinion from the United States Supreme Court rejected the state court's decision, focusing on the allegedly misleading nature of the advertisement. The Court concluded that it was not actually misleading because there was no showing that the advertisement produced the impression among the public that the certification was by the state, or that the public was unable to distinguish "between statements of opinion or quality and statements of objective facts that may support an inference of quality."[181] It acknowledged that the advertisement might be potentially misleading, but said that, even assuming that some might be misled, the blanket ban on such advertising was broader than reasonably necessary to prevent that danger.[182] In drawing these conclusions, however, the Court observed that the NBTA's "standards . . . are objective and demanding."[183] Furthermore, a narrower constraint might have been permissible. For example, the state could have required that certification be based on "objective and consistently applied standards" or that the advertisement include a disclaimer.[184]

The plurality's emphasis on the need for objectivity in the advertised standards highlights the evolution in commercial speech doctrine. The concern regarding misleading speech has become a dominant issue in the cases since its passing mention in *Virginia Board of Pharmacy*. In

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177. 496 U.S. 91 (1990).
178. 455 U.S. at 197.
179. *Id.* at 205.
180. *Id.* at 205-08.
181. *Peel*, 496 U.S. at 101.
182. *Id.* at 106-10.
183. *Id.* at 95.
184. *Id.* at 109-10.

that case, the concern was overridden by the Court's belief that the market depends on the flow of information about products. In *Peel*, the focus has shifted to a concern with market failure due to deceptive or misleading information. This brings the commercial speech test very close to the antitrust test for association standards, which, as described above,[185] requires that standards be derived "based on the merits of objective expert judgments."[186] Thus, *Peel* gives no reason to believe that a requirement of accuracy runs afoul of the First Amendment. This is all the more true because *Peel* did not involve a true claim of quality. In contrast, the medical standards at issue in, for example, *Schachar*, purport to assess the quality or safety of a particular medical service. The opportunity for deception with such a claim is, as the Court has stated, much greater. Hence the Court would probably allow *more* regulation of quality claims.

It is true that regulation of professional advertisements that may be misleading—the commercial speech problem—is significantly different from imposing antitrust liability, including possible treble damages, for misleading standards.[187] However, professional disciplinary proceedings can also impose severe penalties, and the problem of evaluating the statements in the two cases is similar. Professor Havighurst argues that professional speech should not be subject to antitrust limitation because it is difficult for courts to evaluate its accuracy.[188] But there are several

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185. *See supra* section II.C.

186. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) (citation omitted).

187. On the other hand, deceptive standard-setting may present greater dangers than deceptive advertising. This is true because, as described in the text accompanying notes 41-43 *supra*, professional standards, unlike most industrial standards, are generally set by groups with economic interests in the standards. If consumers are unaware of this fact, and interpret professionals standards as if they were set by disinterested groups, they may give the standards more credence than they would advertising. On the same problem in the related area of medical credentials, see Havighurst & King, *supra* note 4 (pt. 1), at 153 ("Consumers can readily perceive advertising's self-serving character and may consequently greet it with a healthy skepticism. They may be significantly less skeptical toward personnel credentialing as a result of its apparently objective and authoritative character, the professional auspices under which credentials are granted, and the typical absence of competing claims.")

188. His argument emphasizes both theoretical and practical considerations:

> Antitrust courts are poorly equipped to evaluate the quality and honesty of opinions and information generated by professional organizations. By hypothesis, the issues are highly technical and controversial. Litigation closely examining the merits of these issues, the circumstances and effects of various pronouncements, the motives of the parties, the honesty of the opinions expressed, and the accuracy and completeness of the facts reported would always be protracted and costly. Yet it would usually be inconclusive on the central questions.

Havighurst, *supra* note 18, at 362.

reasons for rejecting this argument. First, it is not clear that making these judgments is significantly more difficult than other antitrust decisions.[189] Moreover, the antitrust laws operate by deterrence as well as judicial enforcement, so they may have benefits beyond the courtroom that outweigh the occasional difficulties encountered in litigation. More importantly, the accuracy of the speech need not be determined in some absolute sense. It is, after all, only the speech's effects on the market that are important, so it is only those effects that must be evaluated. This can be done by investigating the effects the speech has on the choices of the decision-makers at whom it is directed. The standard would be a potential violation only if the speech leads consumers to make different choices based on a standard's subjective evaluations than they would have made with the available objective facts.

III. Proposals

As part II described, a deceptive or misleading medical standard is anticompetitive to the extent that it makes patients forgo services that they would have purchased with accurate information (or at least in the absence of the misleading information). The market does not gain from purchasing decisions made incorrectly. I propose, therefore, that professional societies be liable for economic injury suffered by their enactment of misleading standards. Although this may seem like a radical proposal, it actually would result in liability in only a limited range of cases. To establish a violation, a consumer or physician would be required to satisfy the usual antitrust burdens of proof by showing that the society possessed market power, that its standard was on balance anticompetitive (*i.e.*, misleading), and that he actually suffered injury as a result of the society's standard. Not many society standards are so firmly expressed and so publicly known that they will affect the demand for a particular service, and presumably few of those are deceptive. Those that are, however, are exactly the standards that are appropriate subjects of concern.

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189. For example, a typical rule of reason case under section 1 requires the assessment of market power and the weighing of procompetitive and anticompetitive effects, both tasks which are difficult and often inconclusive. That does not lead, however, to Professor Havighurst's conclusion that the conduct challenged in such cases should be *per se* legal. *See id.* at 362-63 n.82.

The dissent in *Allied Tube* made an analogous argument, objecting to the majority's failure to define "workable boundaries" to the *Noerr* doctrine's distinction between political and commercial speech. 486 U.S. at 513 (White, J., dissenting). The Court acknowledged the dissent's criticism of "the uncertainty of such a particularized inquiry," but said that blanket immunity was inappropriate and evaluation must rest on "the context and nature of the activity." *Id.* at 507-08 n.10, 509.

Standards can also influence the choices of consumers through their effects on insurers. As Part I described, an insurer's unwillingness to reimburse for a procedure is likely to discourage patients from seeking it. Although such reimbursement decisions are generally the insurer's to make as it chooses, they too can be improperly influenced by medical societies. Therefore, I also propose that the societies be liable for anticompetitive harm that is effected in form through insurers but in fact by the societies.

Both of these topics—the skewing by medical societies of decisions by patients and third-party payers—are discussed below. A third section discusses a topic mentioned briefly earlier. If a medical society is sufficiently concerned about encouraging or discouraging a particular practice, it can seek to have its position on that practice enacted into law. Its efforts to do so will generally receive antitrust immunity under the *Noerr-Pennington* doctrine. This then provides a legitimate, political avenue for societies to impose the restrictions on patient choice that I propose they should be forbidden to impose privately.

A. Speech Directed at Patients

Under the antitrust rule of reason, a violation of Section 1 of the Sherman Act occurs when a group with market power agrees on conduct that is, on balance, anticompetitive. Because the actions of a medical society are by their nature the subjects of agreement,[190] proof that a

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190. *See supra* note 7. Of course, an action taken by a society is actually effected only by a subset of its members. The society is still liable for its actions, however. This issue was considered by the Supreme Court in American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (*ASME*), where it decided that normal agency principles should apply.

In *ASME*, the anticompetitive activity was initiated by an executive of one of the plaintiff Hydrolevel's competitors, McDonnell & Miller, Inc. (M&M). The executive was vice-chairman of the ASME subcommittee responsible for standards governing two of the companies' competing products. He and the chairman of the subcommittee drafted an inquiry to the full committee questioning the safety of Hydrolevel's product. The inquiry was sent to the ASME over the signature of M&M's president. Following standard procedures, the ASME referred it back to the subcommittee, where the chairman "predictably" returned an unfavorable response. The chairman made the response "unofficial" to avoid having to take it before the entire subcommittee, but it was signed by an employee of the ASME and issued on ASME stationery. *Id.* at 560-64.

That the activity was anticompetitive was not at issue. The question on appeal was the extent of the society's liability for its members' actions. The Court's strict approach to trade associations is indicated by its willingness to find the society liable regardless of whether it was an intended beneficiary of the anticompetitive practices: "The anticompetitive practices of ASME's agents are repugnant to the antitrust laws even if the agents act without any intent to aid ASME, and ASME should be encouraged to eliminate the

medical standard violates the antitrust laws requires proof (1) that the society enacting and promoting it possesses market power, (2) that the standard's effects are anticompetitive, and (3) that the plaintiff suffered injury. These tests are neither particularly difficult to apply to society speech nor as likely as societies claim to chill desirable information-generating activity.

1. Market Power.—As described above,[191] the market in which professional societies operate is not the same one in which their members sell their services. Medical societies, with regard to standards, operate in the market for medical information. Therefore, one could evaluate societies' market power by directly evaluating the effects of their actions in that information market. For example, one could estimate market power from market share by evaluating whether a society that issued a statement regarding a particular service provided a large fraction of the information available regarding the subject of that standard. The problem with this approach, though, is that a society could provide *all* of the information regarding a service, and it could even be believed,[192] but it still might not affect the demand for the service. For example, the price of a service could be so low, and its dangers, even as presented by a society discouraging it, so minimal, that consumers would choose to purchase it anyway. The information market, though it has the potential to affect the medical services market, does not necessarily do so.

Therefore, a society's market power should be examined in the market where the effects of its statements are ultimately felt, the market for medical services.[193] In this market, there must be proof a society standard affected demand for a service. This approach, the proof of market power by market effects, was the one adopted by the Supreme Court in the

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anticompetitive practices of all its agents acting with apparent authority . . . ." *Id.* at 574. The parallel to professional societies is clear: regardless of whether the society itself benefits, or the benefits accrue only to some of its members, the society can be held liable for its anticompetitive acts.

191. *See supra* section II.B.

192. That a society provides a large proportion of the information regarding a service does not, by itself, establish that it has market power, only that it has market share. But if the society's statements are accepted, so that it actually influences opinions regarding the service, it has market power (in the market for information regarding that service). It must be remembered, though, that it is not anticompetitive effect in the information market that is of concern. A distortion of consumers' views regarding medical services is only significant (in the view of antitrust law) if it affects purchasing decisions for those services. Therefore, it is only if power in the information market is "leveraged" into the service market that there is anticompetitive harm. *See supra* note 121 and accompanying text.

193. Of course, a society presumably only issues and publicizes a standard because it believes that it has the power to affect demand for its services. *See supra* sections I.B & II.B.

only professional society case in which it examined market power,[194] *FTC v. Indiana Federation of Dentists*.[195] That case challenged the federation's rule prohibiting members from providing patients' x-rays to insurers for evaluation of the services that the members provided. The federation claimed that it lacked market power to enforce its rule. However, the Court noted the FTC's finding that the federation's restrictions were adhered to by its members, and it said those effects were "legally sufficient to support a finding that the challenged restraint was unreasonable."[196] Since a finding of market power is generally a question of fact, the Court did not decide the question, but the discussion indicated that the Court believed the federation had such power.[197]

In a professional standard case the effects at issue are the reduction (or increase) in demand for a particular service as a result of the standard. Therefore, the plaintiff has the burden of showing that the standard had sufficient market power to influence potential consumers' decisions regarding the services. There are at least two ways of making this showing. Following *Indiana Federation of Dentists*, the plaintiff could show that the issuance of the standard was followed by a reduction in demand for the service. The plaintiffs in *Schachar* alleged such a reduction, and the Seventh Circuit apparently acknowledged that it occurred, stating that "[s]peech informed, hence affected, demand for radial keratotomy."[198] Under those circumstances, market power would be established, though it would remain to be shown that the power had an anticompetitive effect.

Another means of showing market power would be to offer the testimony of specific patients who were themselves influenced not to purchase the services in question. This was the approach taken, though not explicitly, by the plaintiff in *Koefoot*, who provided an affidavit stating that potential patients had declined to use him as a surgeon because of the allegations of unethical surgery.[199] Proving market power

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194. The issue of market power has not appeared in most professional society cases heard by the Supreme Court because those cases have generally involved price restrictions. In price cases, the Court has focused on the agreement among the members, and has generally found a *per se* violation without making a specific finding of market power. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348 (1982).

195. 476 U.S. 447 (1986).

196. *Id.* at 461.

197. *Id.* at 460 ("The Commission found that . . . Federation dentists constituted heavy majorities of the practicing dentists and that as a result of the efforts of the Federation, insurers in those areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x rays").

198. Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 399-400 (7th Cir. 1989).

199. *See supra* text accompanying notes 54-55. Dr. Koefoot's affidavit reported the

in this manner is analogous to the approach in tying cases, where actual influence over purchasing decisions can show market power.[200] Although the testimony of a "handful" of patients is not sufficient,[201] the plaintiff need not show that every buyer was affected. In *Fortner Enterprises, Inc. v. United States Steel Corp.*,[202] the Supreme Court said that in the tying context "sufficient economic power" is present "whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market."[203] It must be remembered, though, that the power over buyers must actually come from the seller. If particular buyers, for their own reasons, find the seller's product uniquely attractive, and therefore feel compelled to purchase it, that does not show market power. For that reason, liability in *Fortner* was rejected by the Court. Despite testimony from buyers that they were coerced, there was nothing that indicated that the defendant had any special advantage that allowed it to force customers to accept its products.[204] The Court contrasted the deficiency in proof in *Fortner* with the situation in *Northern Pacific*

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statements made to him by patients, so the statements were hearsay. However, such statements are admissible under the state-of-mind exception to the hearsay rule. Fed. R. Evid. 803(3); *see* Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc., 635 F.2d 118, 128 ("'Statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose . . . .'") (quoting Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 914 (2d Cir. 1962), *cert. denied*, 369 U.S. 865 (1962) (citations and footnote omitted)), *aff'd*, 456 U.S. 556, *cert. denied*, 456 U.S. 989 (1982); *see also* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(3)[03] (1992) ("The declarant's state of mind may be an issue in a wide variety of contexts. Statements may be admitted, for example, to show . . . a customer's reason for refusing to deal with a supplier . . . ." (footnote omitted)). In any event, Dr. Koefoot's affidavit was submitted only in opposing summary judgment; he could presumably have offered the patients' testimony directly at trial.

200. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2080 (1992) ("Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'") (quoting Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984)); *see also* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 8.10 (1985) ("[M]arket power is a necessary condition for inefficient coercion . . . .").

201. *See, e.g.*, Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794-97 (1st Cir. 1988).

202. 394 U.S. 495 (1965).

203. *Id.* at 502-03.

204. The defendant agreed to provide credit to the plaintiff for the purchase and development of land, but only if the plaintiff would agree to purchase prefabricated homes from the defendant. Although the credit terms offered by the defendant were apparently not available elsewhere, the Court said that in the absence of evidence that the defendant had any cost advantage in providing the credit, mere "uniqueness" of the credit arrangements would not provide economic power over buyers. *See* United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 617-22 (1977).

Railway Co. v. United States,[205] where it said not only that "[t]he very existence of [the] host of tying arrangements [was] itself compelling evidence of the defendant's great power," but that the defendant "possessed substantial economic power by virtue of its extensive landholdings."[206] The point of this distinction is that it is not sufficient to show the simple fact of conformity to the seller's wishes; there must also be some reason to think that the conformity was caused by the power of the defendant. In this respect, the case of professional societies is more akin to *Northern Pacific* than to *Fortner*, because the societies' large numbers of members and general prestige lend them the ability to influence patients.[207]

2. Anticompetitive Effect.—Proof of market power demonstrates that the defendant has the potential to impose anticompetitive effects, but a violation occurs only when that potential is realized. As described above,[208] a society standard is anticompetitive when it is misleading or deceptive. Because it is market effects that are important, the test for deception is not a metaphysical search for truth, but only a test of effect on consumers' decision-making. The Supreme Court, in its commercial speech decisions, has indicated that empirical evidence of deception can be used to make this determination.[209] Such evidence could, for example, be produced by a consumer survey of the kind used in trademark cases. The two kinds of cases are in this respect quite similar, since both involve the alteration of consumer choices by deceptive market

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205. 356 U.S. 1 (1958).

206. *Id.* at 7-8. The United States government had granted to the defendant approximately forty million acres of land along the defendant's railroad tracks. Some of the land contained valuable timber or mineral rights. Over the years the defendant sold or leased many of the holdings. Some of the sales and lease agreements required use of the defendant's services to ship products produced on the land, as long as its rates were no worse than those of competitors. *Id.* at 3. No doubt it was not just the extent of the defendant's holdings that concerned the Court, but also the fact that its means of acquisition could not be duplicated by competitors.

207. The district court in *Schachar* addressed specifically this point:

> However, in a case such as this where the statements are made by a large and highly respected professional organization, factors other than the mere persuasive power of its arguments render its statements influential. The views of such an organization specializing in a field about which the general public is generally uninformed, especially where the views are publically disseminated to potential patients and third party payers, acquire significantly more weight and thus have a more coercive effect than would the views of individuals.

Schachar v. American Academy of Ophthalmology, Inc., 1988-1 Trade Cases (CCH) ¶ 67,986, at 58,052 (N.D. Ill.).

208. *See supra* section II.C.

209. *See* Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91, 108 (1990) (plurality opinion).

information.[210] Surveys to determine whether consumers have in fact been deceived have long been admissible in this context,[211] and similar surveys could be conducted to determine whether statements by medical societies mislead consumers or potential consumers of medical services. For example, a society pronouncement regarding the safety of a procedure could be tested to determine whether it conveyed accurate information about the procedure's dangers. If the pronouncement under- or overstated the dangers, either in frequency or in character, it would be anticompetitive.[212] Or, more to the point, a survey could be conducted to determine whether a society statement has the same effect on a consumer's likelihood of purchasing a service as does the objective information available at the same time.[213]

One possible concern is that the evaluation of professional services, unlike that of trademarks, can change over time. A procedure once thought unsafe may later appear to be safe, and *vice versa*. It might therefore seem that to subject a society to liability for standards later found to be misleading is overly restrictive. However, the Court has noted that in the commercial arena, unlike the political one, the danger of overbroad restrictions is not a significant concern.[214] It is therefore

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210. *See* Havighurst & King, *supra* note 4 (pt. 1), at 136-37 (comparing medical credentials to trademarks).

211. *See, e.g.*, Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 680-86 (S.D.N.Y. 1963); *see also* Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 426-29 (1960).

212. For example, in *Koefoot*, the defendant, the American College of Surgeons (ACS), promulgated its view that the practice of "itinerant surgery" was "unethical," and said that it should be avoided in order to provide the highest quality of patient care. *See supra* section I.A. Potential patients hearing the ACS's statements presumably formed opinions regarding the safety of the practice. Although it might be difficult to quantify those opinions, the patients could be surveyed to determine whether they understood itinerant surgery to be unsafe, either in general or as practiced by Dr. Koefoot. If so, and if the ACS could point to no objective facts to back up its statements, those statements would have had anticompetitive effect. (Recall that even if the statements were anticompetitive, there would be no antitrust violation unless the ACS had sufficient market power to affect Dr. Koefoot's business. *See supra* text accompanying notes 191-207.).

213. This test focuses more directly on the anticompetitive harm that a deceptive standard may cause. It also allows the test to include deception due to factors other than the substantive evaluation in the standard. For example, in Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989), discussed in note 135 *supra*, the plaintiff's allegation was that a trade association's standard might have misled consumers into thinking that the association was a "disinterested certifying organization." *Id.* at 487. Deception of this type is as capable of causing anticompetitive harm as is deception regarding particular services. The test in either case is whether the standard distorts consumer choice.

214. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 380 (1977) ("[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context.").

not too great a demand on societies that they ensure that they do not mislead consumers. This is especially so because a society can avoid the problem entirely by confining its pronouncements to objective facts. For example, instead of issuing a statement that a medical procedure is unsafe, it could simply report the results of a study without providing a conclusive interpretation of those results.[215] Interpretation of the results is then left to the individual patient and her physician.

3. Damages.—Finally, a plaintiff must prove she was damaged. This requires that she show a loss in demand for her services as a result of the society action. The proof is likely to be closely related to the plaintiff's proof of market power. Both require establishment of the same sort of connection between the defendant's actions and those of patients. Indeed, if the proof of market power were made through the testimony of coerced individuals, the evidence would also establish damages if the testifying individuals were potential patients of the plaintiff. However, if market power were proved by demonstration of a overall reduction in demand, the plaintiff would also be required to show that she would have been selected as the provider of the forgone services. This would require, for example, that the plaintiff show that she had the skills and facilities available to provide the service.

Meeting these burdens of proof to establish an antitrust violation for issuing a deceptive standard is sufficiently difficult to discourage frivolous claims. To appreciate this, consider that the tests provide two "safe harbors" through which professionals can avoid all liability. First, a single physician can say whatever she likes, as can a group of physicians without market power.[216] It is only market power that raises what would

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215. To some extent, this is the practice currently used in many instances. Medical journals often publish an article reporting the quantitative results of a research study, with the implications of those results examined in an accompanying editorial. This approach was used, in fact, in reporting the results of the PERK study of radial keratotomy. *See* George O. Waring III *et al.*, *Results of the Prospective Evaluation of Radial Keratotomy (PERK) Study 4 Years After Surgery for Myopia*, 263 J. A.M.A. 1083 (1990); Perry S. Binder, *Radial Keratotomy in the 1990s and the PERK Study*, 263 J. A.M.A. 1127 (1990).

216. *See* Wilk v. American Medical Ass'n, 719 F.2d 207, 226-27 (7th Cir. 1983) ("Clearly, an individual medical doctor is free to act on this belief [that chiropractic is undesirable] by declining to associate with a particular chiropractor in the care of a particular patient. It seems reasonable that two or three medical doctors, sharing this view and working as a team in the care of a particular patient would be free to agree, and to act on the agreement, to decline to associate with a particular chiropractor in the care of that patient. The Sherman Act problem in the present case arises from the express embodiment of this viewpoint in a formal set of ethical principles promulgated by a large association of medical doctors, and by the alleged efforts of that association and kindred associations to give effect to the exclusionary attitude in the setting of hospitals staffed by medical doctors.").

There would no doubt be disputes regarding the status of particular statements. For

otherwise be a breach of professional ethics or false advertising to a subject of antitrust concern.[217] Second, even a society with market power can freely issue statements of objective fact. That means, for example, that it can publicize the results of research studies. It need only ensure that it does not put a "spin" on the facts that misleads patients.[218] It

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example, is a statement by the president of a medical society, in which she refers to her position in the society, a statement by the individual or by the society? Is a statement by an individual that he has contacted most of the members of a medical society and that most of them agreed that a particular procedure is unsafe a statement of the society? These are fact-specific questions that cannot be answered here. Presumably they would be resolved by determining whether the statements were made with the apparent authority of the society. This test was established by the Supreme Court in American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982). *See supra* note 187.

217. *Cf.* Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 400 (7th Cir. 1989) ("The Sherman Act is not a code of medical ethics or methodology . . . .").

218. The staff of the Federal Trade Commission addressed precisely this problem in a rule-making proceeding in 1978. The proposed rule included the following requirement:

> A standard shall contain the following:
>
> (a) a statement of its intended scope and use, including products and product attributes intended to be covered by the standard;
>
> (b) a disclosure of any products or product attributes not covered by the standard that users of the standard would reasonably presume were covered;
>
> (c) a disclosure of any serious risks or limitations associated with use of products that conform to the standard, when such risks or limitations would not be apparent to reasonable buyers; and
>
> (d) a statement as to how persons voted on the standard if a list of persons who participated in the development proceeding is printed with the standard.

BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, STANDARDS AND CERTIFICATION: PROPOSED RULE AND STAFF REPORT (1978). The staff stated that the purpose of these provisions was "to guard against deception and misreliance . . . which might occur in their absence and thereby to ensure informed use of standards." *Id.* (footnotes omitted).

The rule was never enacted. In 1980, Congress passed the Federal Trade Commission Improvements Act of 1980, one section of which removed the F.T.C.'s authority to establish rules regarding unfair or deceptive acts or practices in the development of standards. *See* Pub. L. No. 96-252, § 7, 94 Stat. 374, 376 (1980). Interestingly, the committee report for this statute expressed the view that an F.T.C. rule was unnecessary because a deceptive standard would constitute a violation of the Sherman Act: "Given that the rule is largely directed toward antitrust problems and the existence of adequate remedies under the antitrust laws, the Committee believes that there is insufficient justification for a rulemaking in this area." S. REP. No. 500, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S.C.C.A.N. 1102, 1120. The specific antitrust doctrine to which Congress referred was the prohibition of group boycotts. *Id.* However, so long as a standards organization does not include consumers among its members, its standard-setting activities will not constitute a boycott. *See supra* note 131. Therefore, a challenge to a standard based on its deceptive or misleading effects must proceed on a different theory, such as the one described in this paper. It is important to note, however, that Congress, in precluding the F.T.C.'s rule-making, did not intend to discourage any such challenges

is that sort of subjective and deceptive assessment that this proposal seeks to prevent by requiring that a society with market power use it wisely.[219]

B. Speech Directed at Third-Party Payers

The competitive effects of society standards on third-party payers are both similar to and different from their effects on individual patients. The fundamental concern is still influence over patient choices, but the mechanism by which those choices are influenced is entirely different. In this case, patients' choices are influenced not by the standard itself but by the insurer's response to it. If the insurer declines to reimburse for a procedure, the cost to the patient rises from zero (or a small insurance copayment) to the full price of the service. The likely result is that the patient will be discouraged from receiving the procedure. Of course, in general, an insurer is free to decide whether to reimburse for a given service, and can make its decision on whatever basis it chooses. A danger arises, though, when the insurer's power to make that reimbursement decision is controlled by a group of competing suppliers, such as a medical society. If a society provides the insurer with information that distorts its decisions, or if the insurer more directly defers to the society in its reimbursement decisions, the result can be anticompetitive.

1. Market Power.—A medical insurer's decisions affect competition in the market in which patients choose their medical services. The Supreme Court considered this issue in *Blue Shield of Virginia v. McCready*,[220] where the plaintiff's insurer had adopted a policy of reimbursing for psychotherapy only if it was performed by a psychiatrist rather than a psychologist. The plaintiff challenged the policy, which she alleged was the result of a conspiracy between the insurer, Blue Shield, and psychiatrists. Blue Shield argued that, because its policy's most direct effect was on the terms of its contract with the plaintiff's employer, the relevant market was that in which employers chose group health plans, not the

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to specific deceptive standards; it specifically stated that its action did "not preclude the Commission from engaging in case-by-case activities in this area." S. REP. No. 500, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S.C.C.A.N. 1102, 1120.

219. The suggestion of Professor Havighurst that a society's acquisition of respect and esteem—power in the information market—should not subject it to scrutiny is, needless to say, contrary to this view. *See* Havighurst, *supra* note 18, at 362 ("To subject a professional body to close judicial review solely on the basis of the influence it wields might be seen as penalizing its success in establishing its credibility and earning the confidence of independent decisionmakers."). Antitrust law is premised on obligations imposed by the possession of market power.

220. 457 U.S. 465 (1982).

one in which patients chose psychotherapy services.[221] The Court disagreed, noting that the challenged act was the denial of reimbursement, which affected the individual, not her health plan.[222] The relevant market was therefore that in which the effects of the denial of reimbursement were felt, the market for medical services. As the Court observed, "the goal of the competitors was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves."[223]

Given, then, that insurers can affect the market for medical services, how is it that medical societies influence insurers? As described above,[224] insurers often rely on evaluations by medical societies in making their reimbursement decisions. One possibility, therefore, would be that discussed in the last section: the society could issue standards or statements that mislead or deceive the insurer. However, the danger of deception does not exist for insurers nearly to the extent that it does for consumers. Insurers often have physicians on their staffs, or, if they do not, they can afford to have doctors serve in an advisory role. Furthermore, insurers, unlike patients, encounter the same procedure numerous times, so they have more reason to incur the information costs of evaluating the procedure themselves. Therefore, even if a society issues a standard that misleads consumers, it is unlikely to mislead insurers.

The situation is different, however, if the insurer does not take an active role in making its reimbursement decisions. It is possible for the insurer just to defer to the conclusions reached by a medical society. This was the situation alleged by the plaintiffs in *Schachar*, and the district court accepted the possibility:

> Defendants' evidence that some third party payers made their decisions on whether radial keratotomy would be covered independent of defendants' statements merely highlights the presence of disputed facts. By this evidence defendants have shown that while some third party payers may not have relied upon defendants' statements, others may have relied in whole or in part upon defendants' statements.[225]

When an insurer relies "in whole" on a medical society's statement, the decisions it reaches are not its own, but the society's.[226] One might

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221. *Id.* at 479-81.

222. *Id.* at 480.

223. *Id.* at 478-79.

224. *See supra* text accompanying notes 83-85.

225. Schachar v. American Academy of Ophthalmology, Inc., 1988-1 Trade Cases (CCH) ¶ 67,986, at 58,051-52 n.4 (N.D. Ill.).

226. A similar phenomenon was considered in a different context by the court in

therefore hold the society responsible for the anticompetitive effects of decisions made in that manner. That would be unfair, however. Although society members typically agree on statements issued by the society,[227] they do not necessarily seek to have those statements acted upon by a third-party payer. The insurer may adopt the society's views for any of a variety of reasons of its own. It may, for example, seek any available excuse not to reimburse so as to minimize its costs, it may believe that it is appropriate to defer to the expertise of medical professionals, or it may just prefer the administrative convenience and reduced cost of relying on the work of others.

A medical society should be liable for the effects of the adoption of its statements by insurers only if it sought that adoption. That was the case in *Schachar*, where the medical societies sought to have their decisions put into effect by insurers.[228] The societies there did not merely say that radial keratotomy was as yet unproven. Instead, they issued formal statements that the procedure was "experimental," choosing to apply the specific label on which insurers and hospitals based their decisions.[229] They issued their statements with the explicit direction that they be announced to "third party insurers and payers."[230] Finally, through the auspices of the Council of Medical Specialty Societies, they represented radial keratotomy to health insurers as a procedure that should not be routinely reimbursed.[231] All of these actions show an active attempt to persuade insurers to adopt the societies' decisions. To the extent that the attempt was successful, the societies exercised the insurers' power in the medical services market.

The question that remains is that of determining the degree of market power that medical societies can obtain by this means. *Blue Shield* did not specifically address the market power issue, because its focus was on the nature of the potential competitive injury caused by the insurer's

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George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). The plaintiff there alleged that the defendant had restrained trade by influencing a state agency's specification regarding swimming-pool recirculation systems. The court disagreed, stating that "the specifications were the product of the judgment, not unduly influenced by [the defendant], of the pool consultant." *Id.* at 556. The court appeared to be sympathetic to the view that control over the decision-making process could have been a Section 1 violation, *see id.* at 555-61, but because "[the defendant] was not the operative cause of decision," there was no violation, *id.* at 559.

227. Even if not all of a society's members agree on a statement, the society is still liable for its effects. *See supra* note 190.

228. *See supra* section I.B.

229. *See supra* text accompanying notes 72-86.

230. *See supra* note 67.

231. *See supra* text accompanying notes 79-82.

reimbursement decisions. Nevertheless, the Court's reference in that case to the insurer's "concerted refusal to reimburse under a [health insurance] plan"[232] suggests that the Court viewed the market as one consisting specifically of Blue Shield subscribers, the only group for which Blue Shield had the power to make reimbursement decisions. Normally the relevant market for antitrust purposes is not as narrow as the customers of a single provider. However, the Court has recently accepted the possibility of such a market in cases in which customers are "locked-in" to one provider.[233] The situation of insureds who are contractually bound to their insurer is a quintessential example of lock-in, as the Court observed in *Blue Shield*.[234] Given a market defined in this way, *i.e.*, as the subscribers of a single insurer, a medical society that could influence the insurer's decisions would unquestionably have market power, because it would control the reimbursement policy for virtually all that insurer's subscribers.

Even in a broader market, though, a medical society could still acquire significant market power. Consider, for example, the broadest plausible market, which would be the entire market for the medical service at issue. A medical society would control that share of that market defined by the percentage of customers covered by insurers whose decisions it influences. Since in many areas there are large insurers (*e.g.*, Blue Shield or popular HMOs) with appreciable market shares, to attain a large market share a medical society would need to persuade only a few of those insurers. Market share in these circumstances would provide market power, due to the entry barriers created by the established relationships between current medical societies and insurers.[235] Therefore, a society could acquire a large degree of market power through its influence over insurers.

2. Anticompetitive Effect.—To illustrate the inherent anticompetitive potential that exists when medical societies have the power to make reimbursement decisions, consider a scenario based on the facts of *Blue Shield*. Assume that an insurer has decided that it will defer to the judgment of the American Psychiatric Association (Association), as a

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232. *Blue Shield*, 457 U.S. at 480.

233. *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2087 (1992).

234. *See Blue Shield*, 457 U.S. at 480 n.17 ("Although her employer's decision to purchase the Blue Shield plan for her benefit was in some sense a factor that contributed independently to [plaintiff's] injury, her coverage under the Blue Shield plan may, at this stage of the litigation, properly be accepted as a given . . . .").

235. Recall the relationship discussed above between the Council of Medical Specialty Societies and the Health Insurance Association of America. *See supra* text accompanying notes 77-82.

prominent and respected medical society, in deciding whether to reimburse for psychotherapy services. Assume further that its intention to do so is known to the Association. The Association then decides, in good faith or otherwise, that psychotherapy services are only properly performed by psychiatrists, not psychologists, and the insurer, accordingly, declines to reimburse for psychotherapy provided by psychologists. Under these circumstances, it is the Association that has exercised the decision-making power of the insurer. Moreover, it has exercised that power in the market for psychotherapy services, a market in which its members directly compete.[236]

The anticompetitive effects in these circumstances are very great. If an insurer will not pay for a service, the patient must, and the price of services to the patient therefore rises from zero (or near zero) to the full price of the service.[237] Thus, from the point of view of the patient, who makes the purchasing decisions in the market at issue, a denial of reimbursement is in effect a fixing of price.[238] Again, this is not a problem as long as the insurer makes the decision (*i.e.*, sets the price) itself, for it individually is free to make any pricing arrangements it chooses. If, however, it is the medical society that is actually making the reimbursement decision, it engages in a horizontal price-fixing agree-

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236. A medical society might argue in this situation that, because its services (in providing information) are used only by the insurer, not its insureds, it is the insurance company market that is relevant. This is analogous to the defendant's unsuccessful argument in *Blue Shield* that the relevant market in that case was for group health plans, and it fails for the same reason: the intended and actual effect of the society's action is the denial of reimbursement to the individual insured patients. *See supra* text accompanying notes 220-23.

237. *See* Blue Shield of Virginia v. McCready, 457 U.S. 465, 483 (1982) ("Those [Blue Shield] subscribers were compelled to choose between visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice. . . . [Plaintiff] did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services.").

238. The most plausible alternative way to look at the arrangement is as a refusal by insurers to deal with practitioners offering the non-reimbursed service. However, this analysis is not as accurate, because there is no unwillingness to deal with those practitioners; there is just a refusal to pay for a particular service. In any event, a refusal to deal, like a fixing of price, would be an act by the medical society, not the insurer. Therefore, it would be a concerted refusal to deal, or group boycott, which under these circumstances would be treated as severely as price-fixing. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 294 (1985) (noting the Court's *per se* treatment of cases involving joint efforts "to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle'" (quoting LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 261-62 (1977)).

ment as a group of professionals competing in the market at issue.[239] The society should be liable for the effects of that agreement.[240]

Although imposing liability for a group's solicitation of action implemented by a third party may seem severe, it is supported by a Supreme Court decision from this past term. In *FTC v. Ticor Title Insurance Co.*,[241] the defendants were a group of title insurance companies that formed state-licensed rating bureaus to propose rates for their services to state insurance offices.[242] The rates were proposed as part of a so-called "negative option" system, under which rates became effective unless the states rejected them.[243] The companies claimed that, because these programs were authorized by the states, the price-fixing was immune from the antitrust laws under the state-action doctrine, which exempts certain government acts from antitrust liability.[244] The Court rejected

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239. A possible objection to this analysis is that there is no agreement between the society and the insurer. But the absence of *that* agreement is irrelevant. The relevant agreement is among the members of the society, who agree regarding the service and then impose that agreement on their competitors via the intermediary of the insurer. *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 n.4 (1988) ("[A] facially vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal carte[l]' agreement among his distributors is in reality a horizontal restraint." (interpreting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 288 (1978)).

The insurer's absence from the agreement does exempt *it* from liability, however. This is true even if the insurer is in favor of the society's decision, and is willing to rely on it. So long as it acts independently and does not agree with the society, it is not liable. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984) ("The correct standard is that there must be evidence that tends to exclude the possibility of independent action . . . .").

240. In these circumstances, that would probably require something approaching a rule of reason inquiry. Although a *per se* rule still exists against blatant price-fixing, the Supreme Court has applied a test between the *per se* rule and the rule of reason when the challenged agreement is not so straightforward. *See* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 n.26 (1984) ("[T]here is often no bright line separating *per se* from Rule of Reason analysis."); Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979). In the present case, because a medical society's actions persuading an insurer to discontinue reimbursement could serve legitimate informational purposes as well as illegitimate competitive ones, application of the *per se* rule would be inappropriate.

241. 112 S. Ct. 2169 (1992).

242. *Id.* at 2174.

243. *Id.*

244. The state action doctrine as originally established in Parker v. Brown, 317 U.S. 341 (1943), broadly exempted all actions of the states from antitrust liability. The doctrine was based on the view that in enacting the antitrust laws Congress did not intend to restrain the states, and on more general notions of federalism. Since its establishment, the doctrine has been narrowed. It now requires that for state actions to be exempt they must be "clearly articulated and affirmatively expressed as state policy" and "actively supervised" by the state. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (plurality opinion)).

immunity, stating that the negative option schemes did not provide the "active supervision" by the states that is required by the doctrine.[245] It described the reason for that requirement:

> Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.[246]

The parallels with the medical standard-setting in a case like *Schachar*[247] are clear. In both situations a private group agreed on a restriction for the market in which its members sold their services. In both, the group proposed that restriction for adoption by a third party with power in its members' market. In both, the third party adopted the restriction. In *Ticor*, there was no meaningful review of the restriction; in *Schachar*, none was shown. The Supreme Court determined that the defendants in *Ticor* were liable for the effects of their actions. In *Schachar*, where the society sought and received similar action, it should also be liable, especially because the action was effected by a private entity, not the state.

3. Damages.—Damages for an antitrust violation of this kind could be claimed either by patients or by practitioners. The injury to patients, as in *Blue Shield*, would be the cost of medical services for which they were not reimbursed because a society succeeded in having a decision not to reimburse enacted.[248] The injury to practitioners would be the loss of business caused by the non-reimbursement decision.[249] One could

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245. *Ticor*, 112 S. Ct. at 2178-80.

246. *Id.* at 2177. *See also* Patrick v. Burget, 486 U.S. 94, 101 (1988) ("The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.").

247. *See supra* section I.B.

248. *See supra* text accompanying notes 220-23.

249. As described above, the defendant in *Blue Shield* argued that the plaintiff in that case, a patient, did not have standing to bring the action. *See supra* text accompanying notes 220-23. The defendant argued instead that the proper plaintiffs were the competing practitioners (psychologists) who were harmed by its reimbursement decision. 457 U.S. at 478. The Supreme Court rejected the defendant's argument with regard to patients, but

also imagine a claim of damages by the insurer itself. In a situation like that in *Blue Shield*, if the insurer adopted the decision not to reimburse for psychologists' services as a result of the actions of the psychiatrists, the insurer might in the end pay more to reimburse psychotherapy services (if psychologists provide those services more cheaply). The insurer might then have a colorable claim against the psychiatrists. However, an insurer in this situation, claiming damages for what is, in form if not in fact, its own act, is perhaps in an unsympathetic position.[250]

Imposing liability on medical societies in the circumstances described in this section may seem less justifiable than imposing it for the deception of consumers. However, as in that context, the tests proposed here provide easily reached safe harbors for the societies. The easiest is for a society to refrain from soliciting particular reimbursement decisions from insurers. Although the evaluation of a society's actions in this respect will be a fact-specific inquiry, liability should normally be avoided if the society avoided overt solicitation of insurer action like that in *Schachar*. Alternatively, even if it solicits a particular decision, the society need only ensure that the insurer actually gives serious consideration to the decision and does not automatically enact it in response to the society's solicitation. Neither of these approaches is particularly burdensome, as long as the society truly does not seek to impose its decisions on the marketplace.

Notably, in this case, accuracy in the society's statements is not in itself a defense because liability is based not on any objective validity or invalidity of the society's reasons for its decision, but on the fact that the reimbursement decision is not the society's to make. Paraphrasing *Ticor*, "[t]he question is not how well [the insurer's] regulation works but whether the anticompetitive scheme is the [insurer's] own."[251] The rationale is no different from that which guides more typical antitrust cases: market participants are not permitted to agree on restraints on the market, no matter how objectively reasonable those restraints may appear to them.[252]

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it did not disagree with the defendant's view regarding practitioners. Instead, it made clear that both patients *and* competitors could recover: "[T]he remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." *Id.* at 479 (footnote omitted).

250. *Cf. Ticor*, 112 S. Ct. at 2178 (noting that thirty-six states filed a brief as *amici curiae* stating that broad state-action immunity for insurance companies operating under the supervision of state insurance commissioners was not in the states' interests).

251. 112 S. Ct. at 2177. *See supra* text accompanying note 246.

252. *See, e.g.*, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 221-22 (1940) ("Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control

C. Speech Directed at the Government

The preceding sections argued that professional societies should not be permitted to control buying decisions in the markets in which the societies operate. However, at times the anticompetitive danger of such control may be outweighed by legitimate public health concerns. Unscrupulous medical practitioners sometimes promote treatments that are either worthless or actually harmful. When that occurs, medical professionals, and medical societies, have a legitimate role to play in discouraging the practice of such "quack" treatments. Typically, that role will take the form of disciplinary proceedings within the framework of private membership or state licensing procedures. For example, a medical society may enforce against its members the same prohibitions on professional deception that this paper advocates be applied to the societies themselves.[253] Sometimes, however, as when the offending practitioner is not a member of the society, internal procedures are not effective. In that case, a society must resort to other attempts to discourage performance of the service it believes to be unsafe. It does, however, have an avenue to do so that does not implicate the dangers of anticompetitive collusion addressed in this Article.[254]

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the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. . . . Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. . . . It has no more allowed genuine or fancied competitive abuse as a legal justification for such schemes than it has the good intentions of the members of the combination."); *see also supra* text accompanying notes 145-50.

253. *See infra* text accompanying notes 276-77.

254. One commentator has suggested that the public safety should be a defense to an antitrust challenge of a standard. *See* Michael Goldenberg, *Standards, Public Welfare Defenses, and the Antitrust Laws*, 42 BUS. LAW. 629 (1987). He states that "[a] standard having potential anticompetitive effects should be upheld only when the standards organization can demonstrate that the standard is reasonably necessary to protect the public." *Id.* at 650 (footnote omitted). Mr. Goldenberg's concern is with standards that effectively exclude products from the market, *id.* at 632-33, 650-51, so his focus is narrower than that of this Article, which includes standards and statements that discourage but do not actually exclude products. Nevertheless, the specific test that he describes is a more lenient one than that presented in this Article. To determine whether an exclusionary standard is "reasonably necessary" for public safety, Mr. Goldenberg proposes the application of eight criteria. *Id.* at 653-65. Four of these criteria define a more-or-less substantive test for safety-related standards, and it is those four that will be considered here. (As to the remaining factors, one, safety-relatedness, is basically a prerequisite for application of the test at all. *See id.* at 653-55. Another, anticompetitive intent, is discussed only briefly and is apparently included largely because it may cast light on the other factors. *See id.* at 660. There are also two procedural factors, one requiring that a standard be applied non-discriminatorily and the other demanding that the standard-setting organization's procedures be reasonable. *See id.* at 657-58, 662-65. These two criteria are subject to the

If a society believes that any of the services of its profession, or related professions, are undesirable because of safety or other reasons,

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objections to procedural protections that were discussed above. *See supra* text accompanying notes 141-53.)

Two of the substantive criteria address the issue of information availability. One says that a standard should not be permitted to pre-empt consumer choice when consumers have, or should have, access to the relevant information for making that choice. 42 BUS. LAW. at 655-56. The other says that a standard should not be permitted to exclude a product if a less restrictive alternative to exclusion is available. The most plausible such alternative, and the one on which Mr. Goldenberg focuses, is the provision of relevant safety information to consumers. *Id.* at 656-57. Considering these two factors together makes clear that the only circumstance in which an exclusionary standard would be permissible is when an organization was justified in not merely informing consumers of any danger in the product in question. Mr. Goldenberg touches on this issue and notes that in some cases "consumers and public officials may be unable to obtain all information about a product and even the attempt to obtain such information may be costly," so that a product ban may be the more efficient approach. *Id.* at 649; *see also id.* at 633-35. He does not, however, discuss how to determine when that is the case, so these criteria of his test provide little real guidance.

The other two substantive criteria more directly address the reasonableness of standards. One requires that an exclusionary standard be based on objective evidence, and Mr. Goldenberg states that "the evidence at a minimum needs to be substantial enough to have convinced most consumers not to use the product, had they been aware of the evidence." *Id.* at 658. Somewhat similar is the last factor, in which Mr. Goldenberg proposes to use "knowledgeable and reputable purchasers or other industry members" as proxies for "reasonable consumers" in their purchasing decisions, because "a standard should not be considered reasonable if consumers, with knowledge, would decide to purchase the excluded product." *Id.* at 661. If these consumer proxies would use the product, he says, exclusion of it is likely to be unreasonable, *id.* at 661-62; though he does not say so, presumably acquiescence by a consumer group in an exclusionary standard would be evidence that the standard is reasonable. These tests bear a surface similarity to the test described in this Article, which proposes treating a standard or statement issued by a group with market power as anticompetitive if it is deceptive, as evaluated by a survey of consumer perceptions. *See supra* text accompanying notes 208-15. However, the two tests are actually very different. This Article proposes making a determination of whether a statement conveys accurate information for consumers to use in making purchasing decisions; it does not propose removing the decision from consumers. Mr. Goldenberg, in contrast, proposes excluding a product if most consumers, or perhaps a consumer representative, given the relevant information, would opt not to purchase it. In other words, Mr. Goldenberg would allow the removal of a product from the market by a majority of consumers, or by a consumer group. But the antitrust laws do not permit the market to be pre-empted by a majority vote of consumers, any more than they allow such an action by a majority of producers. The market works through the choices of all consumers, not just a majority of them. Recall that the Supreme Court has said that "a purchaser might conclude that his interest in quality—which may embrace the safety of the end product—outweighs the advantages of achieving cost savings by pitting one competitor against another." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 694 (1978). It is implicit in that statement that a purchaser instead might, and should be permitted to, choose cost savings over the safety of the product. *See supra*

so that they should not be available, it can attempt to persuade the state to impose the restrictions it desires.[255] Activities petitioning the government, even if for an anticompetitive purpose, are protected from antitrust liability by the *Noerr-Pennington* doctrine. The foundations of the doctrine were laid in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[256] where the Supreme Court held that the Sherman Act does not prohibit an association's attempt to persuade the legislative or executive branches[257] to take actions restraining trade.[258] Even if a group's motive in petitioning the government is to provide advantage to itself and disadvantage to its competitors, legitimate petitioning activity does not violate the Sherman Act.[259] The *Noerr-Pennington* doctrine thus provides a broad immunity from antitrust liability for actions to influence public officials.

As described above,[260] there are some limitations on permissible speech under the *Noerr-Pennington* doctrine. To a large extent, these restrict only the use of misrepresentation or fraud in less political forums

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text accompanying notes 145-50. A group of market participants must not interfere with that choice. Such a group can properly seek to exclude a product only through the public avenues provided by the state-action and *Noerr-Pennington* doctrines. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) ("'We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.'") (quoting Hallie v. Eau Claire, 471 U.S. 34, 45 (1985) (interpolation in *Allied Tube*)).

255. It is possible that some insurers' actions, and even perhaps some professional societies' actions, might be immune from antitrust liability if directed by regulations of a federal agency, such as HCFA's coverage guidelines. *See generally* 1 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶¶ 222-27 (1978). However, liability would still attach for effects on privately insured patients.

256. 365 U.S. 127 (1961).

257. *Noerr*'s basic holding was later extended to administrative and adjudicative settings, albeit perhaps with more restrictions, in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

258. The Court supported its holding on two grounds. First, it said that since the government has the power to restrain trade, the people should be able to make known their wishes regarding such restraints. *Noerr*, 365 U.S. at 137. Second, it said that to hold otherwise would raise constitutional questions of the right to petition, and that the Court "cannot . . . lightly impute to Congress an intent to invade [that right]." *Id.* at 137-38.

259. *Id.* at 138-39. The Court has since held, though, that legitimate petitioning activity may be relevant for proof of the anticompetitive intent of other activities. United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965). Evidence relating to government petitioning may be admitted "if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *Id.* at 670-71 n.3 (quoting FTC v. Cement Institute, 333 U.S. 683, 705 (1948)) (citations omitted). Admission of such evidence is subject only to the usual limitation that it be probative and not unduly prejudicial. *Id.*

260. *See supra* text accompanying notes 157-60.

than the legislature, such as the courts and administrative agencies.[261] Although the Supreme Court in *Allied Tube* suggested that this limitation might extend to legislative committees,[262] it has imposed no general accuracy requirement in the legislative arena. The reason for its reluctance is its view that Congress in the Sherman Act did not intend to regulate political activities.[263] Nevertheless, it is clear that where a private petitioner possesses the information advantages of a professional society, advantages that may not be shared by any other party, speech intended by the society to persuade the government presents many of the same dangers as does (other) commercial speech.[264]

Therefore, several commentators have proposed that commercial speech standards be applied to *Noerr-Pennington* immunity, either by eliminating *Noerr-Pennington* immunity as an independent doctrine[265] or

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261. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512-13 (1972).

262. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504 (1988).

263. *Noerr*, 365 U.S. at 140-41; *see also California Motor Transport Co.*, 404 U.S. at 512-13.

264. The informational advantages of professional societies present problems even in the absence of any intent to deceive. *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 255 (1957):

> [T]he cost of acquiring information and communicating opinions to government determines the structure of political influence. Only those who can afford to bear this cost are in a position to be influential.
>
> A striking example of this fact is the failure of consumers-at-large to exercise any cogent influence over government decisions affecting them. For instance, legislators are notorious for writing tariff laws which favor a few producers in each field at the expense of thousands of consumers. On the basis of votes alone, this practice is hardly compatible with our central hypothesis about government behavior. But once we introduce the cost of information, the explanation springs full-armed from our theory. Each producer can afford to bring great influence to bear upon that section of the tariff law affecting his product. Conversely, few consumers can bring any influence to bear upon any parts of the law, since each consumer's interests are spread over so many products.

The possibility of deception is, *a fortiori*, of greater concern.

265. *See* Ernest Gellhorn, *Another Perspective on Antitrust Immunity for Petitions to Government*, in THE POLITICAL ECONOMY OF REGULATION: PRIVATE INTERESTS IN THE REGULATORY PROCESS 89 (1984). Professor Gellhorn proposed what he called "a merger of the developing doctrine of commercial speech under the first amendment with the doctrine of immunity for petitions to government under the antitrust laws." *Id.* at 90 (footnote omitted). He referred to the similarities in function between the antitrust laws in preserving an open private market with vigorous product competition and the first amendment in maintaining an open political "market" with "competition in ideas and interests." *Id.* at 91. The approach that he proposed was basically to apply traditional first amendment tests of time, place, and manner to government regulations of speech for antitrust purposes, though he would have also allowed more strict commercial speech standards to be applied as they developed. *Id.*

by applying it only where the speech is not commercial.[266] Both of these approaches, however, are undesirable because it is unwise to base antitrust immunity purely on the evolving commercial speech standard. It is not impossible that the Supreme Court could decide that commercial speech is not worthy of protection at all.[267] Even if that were to happen, *Noerr-Pennington* speech, because it is directed at the government, would still have an undeniably political component that would remain worthy of protection. Commercial entities should continue to be able to petition for government action favorable to their competitive positions independent of any restrictions that may be imposed on their speech in the marketplace.

I suggest, however, that professional societies should be liable for intentional deception in their government petitioning. In *California Motor Transport Co. v. Trucking Unlimited*,[268] the Supreme Court said that practices such as perjury or patent fraud could be an abuse of governmental processes sufficient to remove them from *Noerr-Pennington* immunity.[269] The Court there limited this exception only to administration

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266. *See* Natalie Abrams, Note, *The Sham Exception to the* Noerr-Pennington *Doctrine: A Commercial Speech Interpretation*, 49 BROOK. L. REV. 573 (1983). The author there suggested that "legislative petitioning be considered commercial speech if it (1) involves the business of the entity, and (2) if effective, would result in an economic benefit to the speaker." *Id.* at 596. She recognized, though, that this test could have encompassed some speech that would have typically been thought of as political, not commercial. *Id. See also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 n.5 (1980) ("[M]any, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety."). To meet this problem, she said that it could also be required that the speech be of the character that the Court said in *Virginia Board of Pharmacy* justified the lesser restriction on commercial speech: that is, first, that it be easily verifiable by the speaker and, second, that the speaker have a significant commercial motivation to make it so that he is less likely to be deterred by regulation. Note, *supra*, at 596. *See also supra* note 164 and accompanying text. But her proposed test was then no more than a restatement of the second of the requirements of the Court. After all, if the speaker is strongly motivated to make the speech for commercial reasons, it must concern his business and be to his economic benefit. This is not to deny that businessmen and businesswomen might sometimes make speech related to their businesses that is not to their benefit, but presumably the *Virginia Board of Pharmacy* Court's concern for strong commercial motivation would not be met in such a case. For similar views, see also James D. Hurwitz & Debra Simmons Neveu, *The* Noerr *Doctrine: Its Significance and Current Interpretation*, in THE POLITICAL ECONOMY OF REGULATION: PRIVATE INTERESTS IN THE REGULATORY PROCESS 33 (1984), and James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of* Noerr, 74 GEO. L.J. 65 (1985).

267. This possibility appears unlikely in light of the Court's most recent discussion of the issue. *See* Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993).

268. 404 U.S. 508 (1972).

269. *Id.* at 512.

or judicial processes.[270] However, at least for professionals, who possess specialized knowledge that makes their statements difficult, if not impossible, for others, such as legislators, to evaluate, the fraud exception to *Noerr-Pennington* immunity should be extended to the legislative arena. *Allied Tube* apparently supported this view in its *dicta* to the effect that misrepresentations to legislative committees would be impermissible.[271] This restriction on immunity should, however, be confined to active misrepresentations, as *Allied Tube* appears to contemplate. This would allow societies to petition the government with statements that were inaccurate at the time of the petitioning or were later found to be misleading, so long as the societies were unaware of the inaccuracies. Such a rule would provide sufficient protection to encourage professionals to seek government action based on legitimate concerns of safety.

IV. Conclusion

There is "no basis for believing that professionals act without regard for their own economic interests and, therefore, no basis for antitrust purposes of a broad distinction between 'professional' and 'business' conduct."[272] If members of a non-professional business group with market power joined together to make deceptive or misleading statements about competitors' products, and consumers were in fact dissuaded from purchasing those products, or if the group through a third party was able to raise the products' prices to consumers, the group would be subject to antitrust liability.[273] There is no reason not to apply the same rule to professional groups, especially since the specialized knowledge that professionals possess makes it difficult for others to evaluate their statements.

The basic rationale animating the proposals in this paper is that a professional group should not be able to distort the workings of the market through its private decisions.[274] Restraints enacted by a private society are "imposed by persons unaccountable to the public and without

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270. *Id.*

271. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504 (1988).

272. Thomas E. Kauper, *Antitrust and the Professions: An Overview*, 52 Antitrust L.J. 163, 172 (1983); *see also* Philip C. Kissam, *Antitrust Law and Professional Behavior*, 62 Tex. L. Rev. 1, 11 (1983) ("[S]everal 'Chicago school' economists studying the professions assume that professionals have the same profit-maximizing interests as people in other businesses and that professional self-regulation, like any regulatory legislation, is more likely to result from 'interest group' bargaining than from a principled consideration of the public interest." (footnote omitted)).

273. As described in notes 121, 213 & 226 *supra*, several cases have, at least in principle, accepted these damage theories in cases involving non-professional groups.

274. *See supra* text accompanying notes 145-50.

official authority, many of whom have personal financial interests in restraining competition."[275] The other side of this rule is that a society should be permitted to seek state-imposed restraints. By requiring the organization to take that route, its proposed standards are made subject to the scrutiny (such as it is) that results from any attempt to obtain government action, and they are subject to question from other segments of society. Standards established through this process are more likely to benefit all of society, not just the profession.

The elimination of all but governmentally-adopted professional standards need not eliminate the traditional self-policing role of the professions. It would, however, shift its focus. Under this approach, a professional association's self-policing activities would be confined to the investigation of individual cases in which unprofessional activity is alleged. It could, for example, enforce prohibitions against deceptive practices by its members.[276] This would allow it to discipline members who were misleading patients regarding the risks of procedures that the society believed were dangerous, and would therefore obviate much of the need for possibly deceptive speech by the society discouraging those procedures. Furthermore, this sort of disciplinary proceeding would require specific evidence of a violation of professional standards, as well as a process providing quasi-judicial procedural protections, so it would eliminate much of the anticompetitive danger created by purely internal society proceedings.[277]

As to the undesirability of an association supporting sanctions against its members, such a practice would seem to be an essential function of a self-policing profession. Indeed, it is just the professions' failure to

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275. Allied Tube & Conduit Corp., 486 U.S. at 502.

276. The right of medical societies to perform this function was upheld in American Medical Ass'n v. F.T.C., 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court per curiam*, 455 U.S. 676 (1982). In that case, the American Medical Association (AMA) and two local medical societies challenged an FTC cease and desist order that prohibited them from effecting restraints on advertising, solicitation, and contracting by physicians. The order allowed the AMA to enforce prohibitions on false and deceptive advertising by its members, but the AMA contended that that exception afforded it insufficient protection in case it initiated enforcement proceedings against advertising that was later determined not to be deceptive. *Id.* at 452. In response, the court amended the order to allow the AMA to "enforc[e] reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that [the AMA] *reasonably believes* would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act." *Id.* (emphasis in original). This standard gives medical societies considerable freedom to control attempts by their members to promote unproven or dangerous procedures.

277. *Id.* at 450 (noting that the FTC's Order "require[d] AMA in any proceeding involving violations of its ethical standards to provide (A) reasonable notice, (B) a hearing, and (C) written findings and conclusions.").

perform this function, the tendency of professions to "protect their own," that has caused much of their loss of public trust and esteem. In addition, any argument by a profession that such a practice is undesirable for professional morale is too self-serving to be given much credence. On the contrary, it should greatly benefit professional morale to ensure that the standards of the profession are maintained by sanctioning those who do not meet them.

These changes to current rules would therefore result in a somewhat different role for professional societies. Instead of functioning as quasi-legislatures deciding how their professions should be practiced, as they often do now, they would serve more as information clearinghouses,[278] and decisions regarding particular practices would be made by individual professionals.[279] The result would be a much more open professional environment, with greater opportunity for procompetitive development of new techniques and, consequently, better long-range health for the professions.

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278. Nothing in this Article prevents professional societies from communicating objectively supported information to the public or to insurers. *See supra* sections II.C & II.D.

279. *See* Clark C. Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303, 346-47 n.184 (The author "would permit professional groups to emphasize positive professional values but would encourage courts to regard with suspicion collective actions to denigrate alternative approaches or to focus professional disapproval on a specific competitor or would-be innovator.").

Self-Disclosure, Separation, and Students: Intimacy in the Clinical Relationship

KATHLEEN A. SULLIVAN*

INTRODUCTION

I met most of my clinic students for the first time at an informal coffee hour my colleague and I arranged at the beginning of the new semester, before the first clinic class. Although the event was designed to allow the students to meet each other, it seemed a little awkward because I was trying to meet the students for the first time also, and this was an unfamiliar role for me. I usually came to a new school year having at least met all of my clinic students, because I have been involved in selecting them to participate in the clinic, and the clinic's selection process includes a personal interview. I had not met most of these students, however, because I had been on maternity leave when they had been selected.

At the coffee hour one of the students asked about my baby, and I brought out my baby pictures. It seemed like a good icebreaker, and innocent enough. However, as each new student approached me, looked at the pictures of my daughter, and asked questions about her and my maternity leave, I felt increasingly awkward and exposed. I felt the students had come to me to learn how to be lawyers and here I was, relating to them as a mother. I felt I had been unprofessional.

My reaction was purely intuitive, but there is psychological literature which supports my feeling that I had compromised my image as a competent professional by this self-disclosure. Studies of therapeutic relationships, for example, reveal that while patients generally react

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positively to self-disclosure by their counselor, patients react disapprovingly to counselors who reveal too much, particularly in the initial counseling interview.

My discomfort also related to my perception that by revealing myself to my students as I was meeting them I may have been giving up some of the status which, because of my position as a law faculty member, I might otherwise have been accorded. Again, my intuitive recognition is supported in the psychological literature.[1]

Status is characterized by asymmetry in terms of address and asymmetry of patterns of self-disclosure.[2] Personal information generally flows in the opposite direction from the flow of authority, so that one generally reveals more to one's immediate superior than to one's immediate subordinate.[3] My early self-disclosure to the students reversed this pattern, and I feared I projected less authority as a result.[4]

Furthermore, when there is a clear difference in status between two persons, the right to initiate change to a more intimate form of relationship lies with the superior.[5] My discomfort was heightened by the sense that by my self-disclosure I had invited my students to engage in a more intimate relationship with me. In this respect, I am reminded of the value feminists place on women's connectedness while simultaneously fearing its invasive potential.[6]

Yet there is some sense in which clinical student-teacher relationships are, or at least may become, more intimate than those of traditional law school professors and students; my self-disclosure on meeting my clinic students was certainly less inappropriate than it might have been had I passed around pictures of my baby in a large lecture class.

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This article represents an attempt to understand the extent to which my relationships with my clinical students can fairly be characterized as

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1. *See, e.g.*, Randi L. Carter & Robert W. Motta, *Effects of Intimacy of Therapist's Self-Disclosure and Formality on Perceptions of Credibility in an Initial Interview*, 66 PERCEPTUAL AND MOTOR SKILLS 167, 172 (1988); Norman R. Simonson, *The Impact of Therapist Disclosure on Patient Disclosure*, 23 J. OF COUNSELING PSYCHOL. 3, 3-6 (1976); Mark J. Miller, *Beyond "Mm-Hm": The Importance of Counselor Disclosure*, 27 COUNSELING AND VALUES 90, 94 (1983).

2. Nancy M. Henley, *Power, Sex and Nonverbal Communication*, BERKELEY J. SOC. 1, 8 (1973).

3. *Id.*

4. My concern about projecting less authority may also have been related to the fact that I revealed myself in a less powerful role, i.e., that of a mother. (Mothers are generally perceived as less powerful than law professors.).

5. Henley, *supra* note 2, at 9.

6. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4-42 (1988).

intimate, and the extent to which intimacy is a feature of clinical teaching relationships generally. I approach this task with a fair degree of trepidation, in part because I fear that my attempt to generalize about clinicians' relationships with students is bound to reflect, and therefore be limited by, my own experiences. I also fear that the more self-conscious we are about our interactions with students the more potential we have to manipulate those interactions. As clinicians, we may do too much of that already.

I am convinced, however, as I continue to talk with clinical teachers, that our relationships with our students present the greatest challenge in our work. I am also convinced that attempts to be more self-conscious about our relationships with students, like our efforts to theorize about lawyering skills, are valuable. This may be so particularly because relationships consume much of clinical teachers' energy. I try, for example, to help students negotiate the boundaries of their relationships with clients, adversaries and each other as I simultaneously, and very visibly, balance my own relationships with clients, adversaries, students and colleagues.

Moreover, as clinicians mature, it may be useful to remind ourselves what it is about our relationships with students that enhances our effectiveness as teachers. In this regard, as a young clinical teacher, I think I was often guilty of overidentification with my students (*i.e.*, too much intimacy). The challenge for the future, as age and other factors make me less like many of my students, is to be able maintain a sufficient degree of connection with them to be effective.[7]

In this Article, I will assert three theses about intimacy between clinical teachers and students. First, clinical teaching is, potentially at least, a more intimate form of teaching than traditional teaching, and disclosure plays an important role in making the clinical relationship more intimate. Second, though often problematic and complicated, clinical teaching's greater potential for intimacy is a positive thing. Intimacy creates dilemmas for clinical teachers and students, most of which center around issues of power and control. Third, there are analogies between the issues of intimacy and distance in the clinical relationship and the themes of connection and separation which recur in feminist scholarship. The feminist search for the proper accommodation of connection and

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7. *See* Carol D. Ryff & Susan Migdal, *Intimacy and Generativity: Self-Perceived Transitions*, SIGNS 470, 477-78 (Spring 1984). The psychologist Erik Erikson theorized that intimacy is more important in young adulthood, and generativity becomes more important as one ages. Erik Erikson, *Identity and the Life Cycle*, 1 PSYCHOL. ISSUES 120 (1959). Ryff and Migdal tested Erikson's thesis on a sample of young and middle aged women, and largely replicated Erikson's findings.

separation is helpful to a clinical teacher in negotiating the boundaries of her relationships with her students.

In Part I of this Article, I will explore the concept of intimacy in clinical law teaching, its value and the dilemmas it poses. Part II will explore the literature on clinical supervision with reference to the range of choices clinicians make about disclosure in their supervision and the issues this poses. Part III will discuss the themes of connection and separation in feminist scholarship and suggest ways in which these themes may illuminate the problems of distance and intimacy in the clinical relationship.

I. Intimacy, Law School Methodology, and the Dilemmas for Relationships

A. Defining Intimacy and its Limits in Clinical Teaching

Defining the intimacy of which I speak is a delicate task. As I have discussed this project with other clinical teachers, a number have suggested that, although relationships between clinical students and teachers are different and perhaps closer than those between most traditional law teachers and students, there is nothing particularly intimate about these relationships. Some have suggested, for example, that because the term intimacy often includes a sexual component, it is not an appropriate term to describe the relationship between law teachers and law students.[8] This is not, however, the sense of intimacy I mean to convey.[9]

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8. Martha Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy,* 23 Conn. L. Rev. 955, 970 (1991) (criticizing the traditional view of intimacy between men and women for its emphasis on sexual affiliation); *see* Stephen Thayer, *Close Encounters: Silent But Powerful, A Touch Can Comfort, Greet, Persuade, Inflame,* Psychol. Today, Mar. 1988, at 30.

9. My definition of intimacy is somewhat more expansive than that provided in the legal literature on privacy. Julie Inness, for example, identifies two ways in which intimacy may be defined. Julie C. Inness, Privacy, Intimacy, and Isolation 74-94 (1992). The first is from a "behaviourist" direction, by finding the characteristics of the behavior constituting intimate acts and activities. The second is in "motivational" terms, i.e. by finding some aspect of the motivations demanded by certain acts and activities that could identify them as intimate. Inness rejects the behaviourist definition, arguing that behaviors depend for their meaning on the motivations attached to them, which may vary depending on the culture. Thus, a kiss, or a tap on the shoulder may or may not be an expression of intimacy, depending on the motivations of actors, and the cultural meanings attached to these behaviors. Inness adopts a motivational definition of intimacy as that deriving its meaning and value from the agent's love, liking or care. *See also* Charles Fried, *Privacy*, 77 Yale L.J. 475, 484 (1968) ("[I]ntimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all,

There are other qualities normally associated with the term intimacy that don't translate comfortably into the relationship between clinical teachers and students. For example, the common notion of intimacy conveys a sense of exclusivity.[10] My most intimate relationships are with individuals who, like my spouse and my child, have the potential to make claims on my time and myself exclusive of all other claims. I certainly cannot describe a similar relationship with my students. Yet I strive with each of my students to know them personally and closely while not letting my relationships with any of them exclude any other of my students.

Despite the term's imperfection, I remain convinced that intimacy is the right word, and that relationships between clinical students and teachers are at least somewhat more intimate than those between traditional teachers and students. Thus, the clinical relationship is characterized by a potential for intimacy. I recognize, however, that intimacy is a loaded term and requires some effort at definition.

My concept of intimacy is characterized by four features: proximity, mutuality, trust and self-disclosure.[11] Because the qualities are themselves so interconnected, it is difficult to discuss separately how each of these aspects of intimacy relate to clinical supervision. Nevertheless, I will attempt to do so in what follows.

1. Proximity.—There are two senses in which a clinical teacher's relationship with her students is characterized by proximity. The first refers to physical closeness or nearness. Most clinical teachers interact with their students more frequently, and work with them more closely than traditional law teachers. My students, for example, spend roughly twenty hours each week working just outside my office. I rely on this proximity in supervising my students, in having them sufficiently near to know how their casework is progressing, and to observe their inter-

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and which one has the right not to share with anyone.").

In the discussion of intimacy which follows, I adopt a more behaviourist definition and am content to do so. Because I argue not that clinical teaching is an inherently intimate enterprise, only that it is more intimate than traditional law teaching, the behaviourist definition is less problematic for me than for Inness (who is trying to determine the parameters of privacy to be accorded intimate actions.). Thus, as a kiss — regardless of its cultural meaning, regardless of what motivates it — is a more intimate interaction than passing another on the street, so clinical teaching (for the reasons which follow) is a more intimate form of teaching than traditional law teaching, regardless of whether clinical teaching is, in some absolute sense, an intimate act.

10. Fried, *supra* note 9.

11. Intimacy has also been described as "sharing, taking into confidence and trusting." Marilyn P. Mindingall, *Characteristics of Female Clients That Influence Preference for the Socially Intimate and Nonintimate Female Psychotherapists*, 41 J. OF CLINICAL PSYCHOL. 188, 189 (1985).

actions with partners, office staff, and clients. Similarly, my students rely on the accessibility that my proximity allows. Their questions can be answered when they need them answered, and they have a role model whose behavior they can consider.

It is not only in the confines of the law office that clinical students and teachers share close quarters. Clinical supervision forces students and teacher into close, often intense interaction under stressful conditions. Students and teachers, for example, appear together in court, and together attend depositions, counsel clients and negotiate with adversaries. These shared activities require students and teachers to plan and strategize together, to often travel together, to wait together in courthouses for cases to be called, and even to eat meals together.

The other sense of proximity is that a clinician's relationship with her clinical students is generally closer and more familiar than a traditional law teacher's relationship with most of her students. One reflection of this closer relationship is the way clinical teachers and students address one another. Unlike the formal modes of address that are often featured in the traditional law school classroom, where the teacher addresses the students by title (Mr. or Ms.) and last name, and the students address the teacher similarly by title (Professor) and last name, patterns of address in the clinic are generally much less formal. In the clinical setting, students and teachers most often address each other by their first names.[12]

Although certainly some self-disclosure results from proximity, there may also be an inverse relationship between proximity and self-disclosure. For example, we sometimes reveal more about ourselves to telephone acquaintances or to strangers than to our neighbors. Proximity has a way of raising the stakes for making disclosure, knowing that one will be interacting closely with the individual on a daily basis.[13]

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12. In my experience, even clinical teachers have more formal relationships with their non-clinical students. For the past several years, I have taught a non-clinical course in Law and Poverty. I have noticed how much less close my relationships with the Law and Poverty students are than my relationships with my clinical students. They are less proximate in both of my senses. I see them much less (two hours each week, versus roughly twenty hours each week that I see my clinical students); most venture near my office rarely, if ever, whereas the clinical students are in or near my office most every day. Law and Poverty is also a larger class than the clinic that I teach (35 Law and Poverty students versus 12 clinic students.) Thus, I know each student in my Law and Poverty class less well, and we are much more formal with each other. Most of my Law and Poverty students call me "Professor Sullivan;" few of my clinical students do.

13. The necessary connection between proximity and self disclosure is reflected in a conversation I had with a non-clinical female colleague. She does not invite her students to use her first name, preferring to be called "Professor." She believes this makes her better able to be more open about her feelings in class.

It may also be a reflection of, or a consequence of, proximity or maybe just the quirkiness of my own experience that the door to a clinician's office is often left unlocked when the clinician is not present. I happen to reflect on this because I sometimes have an office in the "traditional" faculty wing in addition to my clinic office and have observed that many of my traditional colleagues keep their doors locked when they are not around. It may be, as has been suggested to me, that clinicians do not lock their doors because they have nothing worth stealing. I suspect, however, that clinicians' unlocked doors also reflect an acknowledgement that the clinic is a place of greater proximity and lesser privacy than the traditional faculty wing.

Clinicians' proximity to their students is not always completely voluntary. There are times, for example, when I long for an opportunity to retreat to the traditional faculty wing. There are times when I feel like I am being followed too closely, even "hounded" by my students.

Proximity can be even less voluntary for students, because teachers have the power to insist upon it. If my students are not spending sufficient time in the office, I think something is amiss. It concerns me when a student is not around even in the odd situation where the student is not falling behind in her casework.[14]

Distance is the opposite of proximity. Perhaps because clinical legal education is a methodology developed and implemented by law teachers within institutions steeped in rules and hierarchy, and which value autonomy, independence, written communication and abstract thought, the relationship between clinical law students and teachers is also characterized by distance.

I consider grading the ultimate distancing process for a clinical teacher.[15] In contrast to the face-to-face evaluation which most clinical teachers also employ,[16] the student is excluded from the grading process.[17]

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14. This discussion of voluntariness is somewhat false because, of course, one chooses generally to be a clinician and generally one chooses to be a clinical student. On the other hand its not clear from my conversations over the years with clinical students and clinical teachers that anyone ever really thinks about these issues before deciding to become a clinical student or clinical teacher.

15. *See* GEORGETOWN UNIVERSITY CENTER FOR APPLIED LEGAL STUDIES OFFICE MANUAL, ch. 9, 1-15 (1984) [hereinafter CALS MANUAL]. I support grading in the clinic with the same reservations as described in the CALS Manual. I believe grading clinic work gives positive messages to students about the value of clinical work as compared to other coursework.

16. *See* note 47 and accompanying text.

17. Teachers of Women's Studies remind us that this is not necessarily so. Frances Maher, *Classroom Pedagogy and the New Scholarship on Women*, *in* GENDERED SUBJECTS: THE DYNAMICS OF FEMINIST TEACHING 29, 44-45 (Margo Culley et al. eds. 1985); Contract grades, self grading, and group grading are common within women's studies courses. We

Law teachers grade students privately, even secretly, and are loathe to reveal their process to students. Not surprisingly, grading is the prerogative of the teacher which gives her the most power over her students, and is fraught with potential for harm. My colleagues and I at Brooklyn Law School, and most clinicians I know, devise methodologies to further distance ourselves from the process of grading in an effort to secure fairness in the process.[18]

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have never adopted any of these methodologies in the clinical program I teach, nor do I necessarily advocate doing so. I had only one experience with self-grading as a student, and I gave myself an A, though I doubted I deserved one.

However, in the clinical program I teach, we did experiment one semester, with giving the students the opportunity, if they wished, to grade themselves for their clinic work. We asked the students to write down, if they wished, the grade they felt they deserved for their clinic work, to put what they had written in a sealed envelope and leave it for us. We indicated we would not look at the student's self-grade until we had completed our grading that semester, and that we certainly would not lower a student's grade based on what they had given themselves. Very few students (only two of twelve) took us up on our offer. Neither student's grade was effected by the grade he gave himself.

18. *See* Patricia Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1946 (1988) (suggests that such methods spare us the pain of judging).

I keep charts of my students' attendance in the clinic seminar and records of their homework assignments, which I scrupulously assign values to. I review my student's time sheets each week. I keep records (some of my colleagues keep journals) of my supervisory interactions with students, and my colleague and I have developed a chart which includes the qualities we value, weighted accordingly, and scrupulously fill in the chart as part of our grading protocol at the end of each semester. Furthermore, I personally supervise only half the students in my clinic; my colleague supervises the other half. Thus, each of us brings a more "distant" perspective to the other's students, which we call on to help us in interpreting supervisory encounters and in evaluation.

While none of these techniques makes for a perfect grading process, they do offer a more distant perspective on our students which serve the values of fairness, equality, freedom from bias and coercion which unchecked proximity might otherwise imperil. Traditional legal scholars rely on rules to achieve the same result, while liberal feminists argue that an integration of rule-based and care-based reasoning has a better chance of doing so. RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 41 (1989) [hereinafter MORAL VISION]; Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1922-23 (1988).

Similarly, the proximity between clinical students and teacher helps break down hierarchy and empower the student's voice. This in turn creates dialogue which exposes the values of legal education, and informs the grading process by sensitizing us to the power we hold over our students, the extent to which we accept the values which dominate evaluation in traditional legal education, and requires us to refine the terms and criteria we use in the "distancing methodologies" described above. One of the things I learned about our grading process, for instance, is that we often valued students with strong abstract reasoning and written communication skills more highly than we valued students with strong interpersonal skills. Once this bias was revealed, we tried to compensate for it.

As grading imposes distance, it inhibits the development of intimacy. Grading may affect the trust a student is willing to place in his teacher. Having discussed grades with both clinical and nonclinical students, my clinical students are more likely to interpret a disappointing grade as a breach of trust. Grading also complicates self-disclosure. Students worried about a "good grade" may be less willing to be critical of themselves, the teacher or the clinic for fear of reprisal.

2. Mutuality.—By mutuality I mean that there is generally an element of reciprocity in clinicians' relationships with their students, more so than in most relationships between traditional teachers and students. For example, a clinician may not only refer to students by their first names, but permit students to call her by her first name as well, even in an environment where most non-clinical teachers are referred to as "Professor." Similarly, clinical teachers not only expect their students to make self-disclosure as part of their pedagogy, teachers make it as well.[19] Mutuality contributes to a reduction in hierarchy between teacher and student. Since relationships between subordinate and superior are characterized by asymmetry, to the degree a relationship is mutual it is a more equal relationship.

A clinical relationship that is less hierarchical can act as a motivator for some law students.[20] I am convinced that this is related to the fact that much of law school is so hierarchical, with students so frequently close to the bottom of the hierarchy, that a more egalitarian clinical relationship generally feels empowering in contrast.[21]

There is a good deal about the clinical relationship that is not mutual, however. Students do not have the power to grade teachers, for example, no matter how egalitarian their relationship otherwise may seem. Furthermore, although clinical methodology may encourage students to critique their supervisor's ideas and lawyering, this critique does not have the same harmful potential that grading holds for students. Finally, even to the extent the relationship is a mutual one, often the

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19. Jean Koh Peters has suggested two other forms of mutuality that characterize the clinical relationship: mutuality of fulfillment and mutuality of learning. By mutuality of fulfillment she means that students and teachers are mutually invested in the success of the experience; students look forward to learning and recognize that the teacher's observation of their learning is an important part of her satisfaction. By mutuality of learning she suggests that students and teachers learn from each other; teachers teach students about lawyering and students teach their teachers about lawyering and teaching. Letter from Jean Koh Peters, on file with the author.

20. *See, e.g.*, Jane H. Aiken, David A. Koplow, Lisa G. Lerman, J.P. Ogilvy & Philip G. Schrag, *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1049, 1056 (1985) [hereinafter *The Learning Contract*].

21. Michael E. Carney, Ph.D., *Narcissistic Concerns in the Educational Experience of Law Students*, J. PSYCH. & L. 9, 27 (Spr.-Sum. 1990).

supervisor sets the tone. I usually give students permission, for example, to call me by my first name.[22]

3. Trust.—Trust is dependence on the good will of another.[23] To some extent, clinicians can fairly be said to be engaged in vicarious lawyering, that is, that clinicians lawyer through their students. If for no other reason, trust is an important feature of the clinical relationship.[24] The process of clinical teaching requires that the clinician trust the student sufficiently to lawyer in her name and yet respect the student's autonomy and his relationship with his client to the greatest degree possible.

Similarly, the process of clinical teaching to some degree assumes, perhaps naively, that the student trusts the teacher.[25] If a clinical teacher models a lawyering activity and asks for the student's feedback, she tries to develop in the student sufficient trust that the student can honestly disclose his feelings without fear of reprisal or ridicule.[26] To the extent the pedagogical goals of certain clinical programs include attention to the interpersonal aspects of lawyering, the importance of trust is heightened.[27]

Although trust helps create intimacy, it does not necessarily reduce hierarchy. In fact, trust exists in profoundly unequal relationships such as master and servant.[28] Trust can also be involuntary. Mothers, for instance, trust in the goodwill of child care providers because they have

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22. Actually, I have adopted a number of different postures toward the issue of what my students call me. I find I am most comfortable saying nothing about it, and letting the student decide what to call me as our relationship evolves. [It often takes students a while to get around to calling me by my first name.] This is probably the least comfortable choice for students. In the years where I have made a choice not to say anything about the issue of names, I frequently find that a student (generally a white male student) will ask, "What should we call you?" Although it is framed as a question, I always feel called on my attempt at a power play.

23. Annette Baier, *Trust and Antitrust*, 96 ETHICS 231, 235 (1986).

24. *See* note 94 and accompanying text for examples illustrating the importance of trust in the relationship between clinical students and teachers.

25. Michael Meltsner & Philip G. Shrag, *Scenes from a Clinic*, 127 U. PA. L. REV. 1, 10 (1978) (describing an exercise clinical teachers attempted to use with limited success because of student reticence to disclose personal information about themselves).

26. Trust is reciprocal; psychological studies show that "the more trusting we are, the more likely we are to be trusted by others." Cary S. Avery, *How Do You Build Intimacy in a Age of Divorce?* PSYCHOL. TODAY, May 1989, at 29.

27. The Center for Applied Legal Studies at Georgetown University, for example, makes attention to the interpersonal aspects of lawyering an explicit goal of the program. *See infra* notes 55-62 and accompanying text.

28. Baier, *supra* note 23, at 247 (Baier argues that traditional descriptions of trust placed too heavy emphasis on analogies to contract. Contract notions may adequately explain trust that exists between actors of equal power, but does not adequately explain the trust between actors of superior and inferior power.).

no alternative, because "no one is able by herself to look after everything she wants to have looked after."[29]

Because self-disclosure, proximity and mutuality in the clinical relationship make students and teachers more vulnerable to harm by one another than is the case in the non-clinical classroom, the need for trust is heightened. As the teacher and student must trust each other, however, they must not trust so much that they fail to be critical of each other.[30]

Psychological studies of couples involved in intimate relationships suggest that trust can be so complete as to fail to see areas for improvement.[31] Even when one perceives an area for improvement, trust may act as a barrier to communicating that perception.[32] A clinical teacher's need to give and receive feedback thus requires that there be some limits on the trust her students place in her and that she places in them.

For instance, I would think there was something amiss if my students trusted my judgment unquestioningly. Indeed, I consider the student's ability to engage in a meaningful dialogue with his supervisor over strategic or professional responsibility issues in a case to be a sign of the student's growth. This kind of discussion seems helpful to the extent student and supervisor trust each other, and threatening to the extent they do not.

4. Self-Disclosure.—Disclosure is key to the development of intimacy.[33] Self-disclosure involves revealing personal and other information about oneself to another.[34] For a teacher, self-disclosure is often conscious, as when I answer students' questions about my background, or share my own uncertainty about how to proceed in a particular situation. Much of my self-disclosure, however, is unconscious, even inadvertent, as when I talk to my husband, my mother or my caregiver over the

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29. *Id.* at 236.

30. This is one example of the dialectical relationship between connection and separation. *See* discussion note 57.

31. John K. Rempel & John Holmes, *How Do I Trust Thee*, PSYCHOL. TODAY, Feb. 1986, at 28.

32. *Id.*

33. Fried, *supra* note 9.

34. *See* Bernadette Mathews Ph.D., *The Role of Therapist Self-Disclosure in Psychotherapy: A Survey of Therapists*, 32 AM. J. PSYCHOTHERAPY 521, 523 (1988) (self disclosure is "the process of making "the self known to other persons"); Miller, *supra* note 1, at 91-92; (surveying various definitions of disclosure); John M. Curtis, *Indications and Contraindications in the Use of Therapist's Self-Disclosure*, 49 PSYCHOL. REP. 499 (1981) (Self-disclosure represents the "act of imparting personal or private information. . ."); Paul C. Cozby, *Self-Disclosure: A Literature Review*, 79 PSYCHOL. BULL. 73 (1973) (self-disclosure is "any information about himself which Person A communicates verbally to Person B").

telephone within earshot of my students, or when my students sense my uncertainty about how to proceed in a case despite my best efforts to conceal it.[35]

Students also disclose personal information about themselves to me, both consciously and inadvertently: I often know, for instance, about my students' family backgrounds and career plans, whether they are married, their sexual preferences, and whether they are applying for and their success at obtaining jobs. I also know (or will eventually learn) whether they are passive rather than disinterested, or unaware rather than arrogant or insecure rather than overly self-confident. I know when they are angry with me or each other. I have enough contact with my students so that sometimes I can see patterns in their behavior, as they sometimes see patterns in mine.[36]

As my experience with my students at the coffee hour reminds me, however, one-sided disclosure does not always yield intimacy. In fact, without intimacy, disclosure often seems inappropriate. By sharing pictures of my daughter with my students I did not forge an intimate relationship with them. Indeed, had I passed around the pictures in a class of 150, I would have achieved even less intimacy, although I probably would have felt more exposed.[37] On the other hand, disclosure often encourages disclosure in others.[38]

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35. In the context of therapy, one therapist has noted that "we are, in fact, revealing ourselves all the time, whether we do so deliberately or not. Even the most distant therapist is, despite his judgment and training, leaking his personality into the therapeutic process." Miriam Greenspan, *Should Therapists Be Personal? Self-Disclosure and Therapeutic Distance in Feminist Therapy*, THE DYNAMICS OF FEMINIST THERAPY 5, 9 (1986). This observation seems applicable to the relationship between the clinical supervisor and student.

36. At the end of one term, for example, my students told me that my favorite expressions were, "How are you feeling about ____?" and "Am I making any sense?"

37. Again, I think this depends, to some extent, on the speaker's purpose in making the disclosure and the relationship between the purpose and the disclosure.

I have been on the receiving end of a speaker's self-disclosure to a large audience. At the plenary session of the 1990 Annual meeting of the Association of American Law Schools, a panel of speakers shared personal experiences of being different from others in their legal institutions. Although each of the speakers incorporated personal narrative compellingly into their presentations, I felt that one speaker made the most intimate self-disclosures. He spoke of his sexual identity, and how it felt to be a gay man in an academic institution and in the legal profession.

Although I was powerfully moved by this speaker's self-disclosure, I certainly did not and do not feel particularly intimate with him. And yet in the question and answer session following the presentation, many of those who spoke shared their personal experiences, and it was clear that the generally impersonal, harried, chaotic AALS convention, had at least temporarily, been transformed into something more intimate.

38. Connie DeForest & Gerald L. Stone, *Effects of Sex and Intimacy Level on Self-disclosure*, 27 J. COUNS. PSYCH. 93 (1980); Paul C. Cozby, *Self-Disclosure, Reciprocity, and Liking*, 35 SOCIOMETRY 151 (1972).

Perhaps it is because of the simultaneous need for distance in student-teacher interaction, that defining the parameters of the intimacy clinical teacher and students may share is such a complicated task. For example, self-disclosure can be an important pedagogical tool for the clinical teacher, but so is withholding disclosure. There are times when the teacher should not share her experience, but listen for that of the student.[39]

Furthermore, assuming the value of self-disclosure as a pedagogical tool, there are limits on the kind of information one shares with one's students. One does not, for example, tell one's students about one's miscarriages or extra-marital affairs.[40]

In some sense, in any relationship, we are revealing ourselves all the time, regardless of what we choose to "disclose." Clinical teachers and students, for example, reveal themselves to each other unconsciously and nonverbally through their patterns of interaction. These interactions can contribute to a sense of intimacy. Depending on what each holds back, and the perceptions of the receiver, the image one projects to the other can be incomplete and even distorted.

At least theoretically, however, it is the sorts of voluntary, conscious, verbal disclosures[41], which we have the most control over, and which have the potential to deepen the intimacy of our relationships. Because of this, much of the discussion which follows focuses on this type of disclosure.

Disclosure as it relates to the relationship between clinical teachers and students can be categorized as follows: personal (sharing information about oneself); professional (sharing information related to one's role as a lawyer); and pedagogical (generally, revealing the reasons behind teaching or supervisory choices).

To some extent, clinicians consciously employ disclosure (sometimes making it, but more often asking students for it) as a pedagogical tool.

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39. Ann Shalleck, in an article on clinical supervision, calls this respecting the integrity of the student's process by letting it be sometimes. *See generally* Ann Shalleck, *Clinical Supervision in Context: From a Case to a Vision* 120 (1990) (unpublished manuscript). *See also infra* notes 67-70 and accompanying text.

40. One legitimately might make such a disclosure. *See, e.g.,* Robin West's disclosure of her sexual promiscuity in *The Difference in Women's Hedonic Lives.* Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory,* 3 WIS. WOMEN'S L.J. 81, 101 (1987). West's self disclosure was connected to her thesis; it made a point, as it were, and I suppose that makes it legitimate to me.

41. What I mean by verbal disclosure is disclosure involving language; I include therefore the kind of written disclosure reflected in this article, as well as the disclosure students often reveal in journals they keep as part of their clinical experiences. *See, e.g.,* Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender,* 28 HARV. C.R.-C.L. L. REV. 1 (1993) (examples of the remarkably personal disclosure students make in journals).

There are many, varied goals for clinical legal education articulated by clinical teachers: to teach students lawyering skills,[42] to teach something broader about the legal system and the role of lawyers in the system,[43] to teach students about the role of interpersonal dynamics in lawyering,[44] or to teach the importance of serving clients.[45] Regardless of the individual clinical teacher's goal, the primary focus of clinical legal education, and in a larger sense every clinical teacher's goal, is to teach students how to learn from experience.[46]

Most of what "teaching students how to learn from experience" means is teaching students to be reflective. Much of the way clinicians teach students to be reflective involves disclosure. Clinical teachers frequently ask students to reflect on an experience, and disclose that reflection; often clinical teachers model that reflection.

Modeling self-reflection is risky, and has the potential to undermine the teacher's authority.[47] To model self-reflection, therefore, requires not only self-disclosure, but trust (i.e. the teacher has to trust her students to some extent). Similarly, a student's ability to engage in self-reflection is enhanced to the extent she can trust and reveal herself to the teacher and others.[48]

Often clinical teachers employ the evaluation process to teach self-reflection to their students.[49] Like the clinical relationship itself, evaluation

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42. *See generally* Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, ARIZ. ST. L.J. 277-85 (1982) [hereinafter *Course Design*]; Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L.J. 301, 312 (1986) [hereinafter *Stages*].

43. *See generally* Shalleck, *supra* note 39; *Panel Discussion: Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future,* 36 CATH. UNIV. L. REV. 337, 349-51 (1986) (comments of Elliot Millstein).

44. *See, e.g., The Learning Contract, supra* note 20; CALS MANUAL, supra note 15, at ch. 6.

45. *See, e.g.,* Gary Palm, *Message from the Chair*, NEWSLETTER OF THE SECTION ON CLINICAL LEGAL EDUCATION (American Association of Law Schools (AALS), Washington, D.C., 1986).

46. Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 616 (1984).

47. Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162, 168 (Spr. 1990). "We indicate respect for a person by acknowledging his territory; conversely, we invite intimacy by waiving our claims to a territory and allowing others to draw close." (quoting Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort,* 77 CAL. L. REV. 957, 973 (1989)).

48. It has been suggested that self-disclosure encourages the development of trust. Mathews, *supra* note 34, at 523; *But see*, Fred W. Vonderacek & Marilyn J. Marshall, *Self-Disclosure and Interpersonal Trust: An Exploratory Study*, 28 PSYCHOLOGICAL REPORTS 235, 238 (1971) (testing failed to demonstrate any relationship between interpersonal trust and self-disclosure).

49. Nina W. Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 PAC. L.J. 967, 972 (1990).

has components both of intimacy and distance. Most clinicians conduct face-to-face evaluations with their students, not unlike the mid-semester evaluation described above. These face-to-face meetings feature, at least aspirationally, openness and frank reflection by the student on her strengths and weaknesses, and supportive and frank response by the supervisor. To the extent the aspiration is achieved, the evaluation process is characterized by some degree of intimacy.

However, I have sometimes found myself trying to impose distance between myself and a student in these meetings, particularly when I found a student unwilling to be self- reflective. Instead of connecting with or supporting the student, sometimes I need to be more austere to motivate the student to think more critically about his actions.

Many clinicians ask students to keep journals during their clinical experience, and most clinicians read and comment on student journals. Students are encouraged not only to report on their experiences in the clinic, but also to share their reactions and feelings about those experiences.

Although I haven't surveyed clinicians on this, I suspect that most clinicians find pedagogical disclosure most often legitimate and purely personal disclosure most often illegitimate. Furthermore, even as I present this taxonomy I question its utility. I can conceive of many examples that do not fall neatly into these categories. [The lines blur for me, for example, in the story that starts the "dilemmas" section.][50]

Choices clinicians and students make to disclose or withhold disclosure are central to the development of intimacy between them.[51] Of all of the various aspects of intimacy, disclosure is, at least potentially, the one over which I have most control. It is perhaps because of this that my most troublesome supervisory dilemmas seem to revolve around power and control issues, and often involve questions concerning disclosure.

B. The Dilemmas Disclosure Poses for Clinical Teachers and Students

One of the students in my clinic was the father of two young children. During the early part of the semester, although he and his partner were working hard and capably, I felt this student was devaluing certain aspects of the work I deemed important. He was not keeping file memos, for example; in part as a result, I felt that I was out of

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50. *See infra* note 113 and accompanying text for an example of disclosure that I felt was simultaneously personal, professional and pedagogical.

51. *But see supra* note 48.

control of the team's work and that the student and his partner were too independent.

The student always justified not having file memos completed because he was too busy working on tasks he felt were more important. The student and his partner were preparing for a deposition and drafting a memorandum of law in an action in the United States District Court. They were indeed working hard on these tasks, and the quality of their work was quite high, although I kept feeling that the tasks could be completed in less time than the students were taking.

Soon, the student began to be late for supervision meetings and once or twice attempted to reschedule a supervision session to accommodate some case-related work that "really needed" to be done. Having attempted unsuccessfully to deal with these issues with the student over the course of the semester, I raised them with him again during our mid-semester evaluation meeting.

The student admitted that he was having difficulty, not only completing file memos on time, and fitting in supervision meetings, but balancing his competing roles and getting his clinic work done efficiently so that he could manage his family commitments. His wife had recently resumed a career in journalism, having left her position as a newspaper reporter to have children. She had contracted to write several articles for major magazines, and my student had agreed to share child care responsibilities so that she could meet her publication deadlines. Recently, he had failed on several occasions to make it home from the clinic at the agreed upon time to take over child care from his wife.

The student and I discussed whether the "important tasks" which took up so much of his time were either so important or so time consuming as to justify his delay in writing file memos or rushing through or missing supervision meetings or indeed not getting home to take over child care from his wife as he had promised. I believed that it would enhance the student's ability to draft a memorandum of law once he learned to spend less time on it. The close, painstaking detail he brought to deposition preparation and briefwriting, while an important perspective on lawyering—was only one perspective, and he needed to be able to operate in more than one mode. I shared these beliefs with the student.

I also believed that the student needed to balance his clinic obligations better and that finding more time to care for his children would actually enhance the student's lawyering skills.[52] I realized, however, that I had

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52. Ursula LeGuin offers that there ought to be something valuable we as primary caretakers can bring to our writing because we are primary caretakers, and that the caretaking work that we do becomes then not merely a distraction or an inhibition to

strong motivation to believe this was true whether or not it was, since becoming a mother had left me with fewer hours to devote to my own teaching and lawyering work each day than had previously been the case. I did not disclose my investment to the student, though he may have sensed it anyway.

I identified strongly with the student's wife, and although the student may also have sensed this, we did not discuss it explicitly. I worried that revealing my own struggles with the equitable division of caregiving would have undermined my credibility in urging the student that the ability to "let go" of certain tasks, and not to focus on some tasks to the exclusion of others, was an important lawyering skill. I clearly saw a connection between the student's behavior in the clinic and his description of his behavior at home. In focusing on his brief and deposition to the exclusion of file memos and supervision meetings, I saw the student defining his priorities by attending to the "power-enhancing" work first. Similarly, by allowing the lawyering work in the clinic to prevent him from getting home to do child care, he was according priority to a more powerful role (lawyer) over a less powerful one (caregiver). I worried, however, that revealing the connections I saw would not only undermine my credibility and perhaps my authority with the student but might interfere impermissibly in his personal relationships.[53]

Although intimacy in all its various aspects creates dilemmas for clinical teachers, the aspect I find consistently most troubling, or at least most highly charged, involve issues of disclosure. This experience, for example, illustrates at least four potential dilemmas that intimacy, primarily the disclosure component of intimacy, poses for clinical teachers and students. First, although the reduction of hierarchy is often an

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our writing but something that enriches it. *See* Ursula LeGuin, *The Fisherman's Daughter*, DANCING AT THE EDGE OF THE WORLD 213, 228, 231, 236 (1989). Her words have encouraged me to share my narrative about my first meeting with my students this semester. Similarly, I felt that this student needed to see that being a good father did not require that he sacrifice being a good lawyer, rather, that being a good father enhanced his ability to be a good lawyer.

53. The issue of whether to reveal personal connections to a student is a familiar dilemma in the therapist/patient relationship. For example, one therapist found that revealing he was divorced hindered his ability to assist married couples. Mathews, *supra* note 34, at 527. On the other hand, Miriam Greenspan discovered that sharing her pain over her child's death helped clients explore numerous issues upon learning of her vulnerability. Greenspan, *supra* note 35, at 15. Greenspan cautions, however, that therapists "must guard against talking about ourselves as a way of emotionally unloading in a relationship that is safe for us precisely because we have considerable power in it." *Id.* at 7. This warning could also apply to the relationship between the clinician and the student.

explicit goal of a clinician's more intimate relationship with her students, there may be times when she wants and needs to call on her authority, particularly where the student's standards of practice seem to be lacking. In my example with my student, if I couldn't convince him that file memos were as important as briefs and depositions, then I wanted him to pay more attention to file memos, because I said so. Does intimacy make it harder for a clinician to call on her authority? If so, should clinicians avoid intimacy unless the student has assimilated the models of competent lawyering the teacher is trying to impart? Is a more intimate approach only pedagogically justified when the student proceeds to critique those models, or to learn self-reflection?

These questions imply that intimacy can be controlled, and a corollary to my assertion that clinical teaching is fraught with potential for intimacy is that frequently it cannot be. When I initiated my discussion with my student, I did not expect to learn anything about his home life. I have limited ability to control the patterns of interaction that led this student to reveal a personal problem to me.

Third, intimacy can be intrusive, both for the teacher and for the student.[54] There are times when a student's learning may be enhanced by a clinician's disclosure that a particular issue may be difficult for her as well, but the clinician may not feel like sharing that issue with that particular student at that particular time. In the example above, even if it would have enhanced the student's learning to disclose my own struggles balancing child care with my lawyering and teaching responsibilities, I didn't want to reveal those things to that student at that time. Similarly, even if it enhanced the student's learning to make connections between the issues in his lawyering and the issues in his personal life, does the clinician have any right to comment on the latter?

Finally, even though intimacy has the effect of reducing hierarchy, the clinician inevitably retains more power in the relationship than the student. What do we do with students who don't want to be intimate? In the example above, in some sense, the student "voluntarily" disclosed information about his relationship with his spouse. Had I wanted to engage the student more on his role as a father and spouse and the connections to his lawyering, how could I have been assured that the student didn't feel coerced into discussing his personal life with me? Clinicians expect their students to be self-reflective. The extent to which a student can reflect critically is often the basis for evaluation in clinical programs. How do clinicians guard against coercing trust and self-disclosure from their students?[55]

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54. *See The Learning Contract*, *supra* note 20, at 1063, 1078.

55. One of the risks of disclosure (and maybe the other aspects of intimacy) is

II. The Role of Disclosure in the Literature on Clinical Supervision

Nearly all clinicians employ some disclosure in clinical teaching, even if it is only the sort of pedagogical disclosure described above.[56] The written literature on clinical supervision reflects some of clinician's choices concerning disclosure and the range of differences among clinicians concerning these choices. The literature on clinical supervision also reveals some of the dilemmas clinicians may experience around issues of disclosure.

At the Center for Applied Legal Studies (CALS), a clinical program of Georgetown University Law Center, clinicians employ a learning contract as part of their clinical supervision.[57] The adherents of the contract approach describe educational goals emphasizing the interpersonal aspects of lawyering: helping law students learn to accept responsibility, teaching problem-solving through reflection on the process of decision making, teaching collaboration, and exploring students' value choices.[58]

The learning contract is individually negotiated between a supervisory team and each pair of student interns. The contracting process consumes the first two to three weeks of each semester, thus shaping the supervisor and student's interactions with each other from the beginning of their relationship. At the beginning of the semester, the students receive a draft contract, prepared by the clinic faculty, which contains some standard provisions; the students meet their supervisors at the first contract negotiating session having considered the draft contract, ready to propose additions, modifications, or deletions.

One of the explicit goals of the contracting process is to reduce, though not eliminate, the hierarchy inherent in the student-teacher relationship. The contract defines, for example, the roles the supervisor is willing to play with the student, by encouraging certain descriptive names for supervisors (advisors, resources, catalysts and process consultants) and discouraging certain others (bosses, partners, and leaders). Only rarely and with reluctance have supervisors been willing to contract for higher status roles.[59]

The contract also sets certain ground rules for interaction between student and supervisor. For example, because CALS is designed to teach

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that it can become indulgent of the supervisor's needs for approval or closeness and harmful to the student or at least not in her best interest. *See, e.g.*, Mathews, *supra* note 34, at 530.

56. *See* note 37 and accompanying text.
57. *See generally The Learning Contract*, *supra* note 20.
58. *Id.* at 1048-50.
59. *Id.* at 1059-61.

students about the interpersonal aspects of lawyering, the learning contract generally contains a provision permitting the supervisors to comment on group process or interpersonal dynamics.[60] As is the case with the contract terms defining the relationship, to the extent a particular team of students wants to remove this standard term from its individual contract, the faculty "bargain hard" to keep it in. Another standard contract term prohibits any case-related discussions between students and teachers unless all members of the case team are present.[61]

The gendered dimensions of disclosure are revealed in the clinic's experience with the proscription on substantive discussions without the entire case team being present. The faculty identified this as the only contract term faculty breach with any regularity.[62] Women supervisors particularly had trouble refusing students' requests that they speak with them. Perhaps not coincidentally, the women supervisors had less status than the male supervisors. (The women supervisors were LLM candidates who were themselves interning in the clinic, whereas most of the male supervisors were members of the tenured faculty.)[63]

It is not only the substantive contract terms, but the contract negotiating process itself that shape the interactions, and patterns of disclosure, between students and teacher. For example, the standard contract form requires students to disclose their learning goals. Faculty do not disclose similar learning goals, and have resisted students' efforts to require them to do so. The CALS faculty recognize that the lack of parallel disclosure reinforces the hierarchy between student and teacher, but are content to allow this much hierarchy to exist. It is important, they argue, to recognize the real power disparities between student and teacher that the contracting process cannot eliminate.[64]

I am again struck by the acknowledged relationship between disclosure and power, and the supervisor's unwillingness to relinquish that power, even in a clinic which aspires to reduce hierarchy. It reminds me of my discomfort after revealing my baby pictures to my students at my first meeting with them, and how vulnerable I felt having thereby undermined my "professorial authority" on the first day. I wonder

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60. *Id.* at 1060.

61. *Id.* at 1071.

62. *Id.* at 1073.

63. *Id.* at 1073, n.86.

64. *See generally The Learning Contract*, *supra* note 20, at 1053-61. Some students, acknowledging the relationship between self disclosure and power, have pointed out that this asymmetry gives the instructors more power in the process. The faculty, insisting that the instructor's power is real, resisted the students' effort to force the instructors to articulate learning goals for themselves in the contract, lest this very real power disparity be obscured.

whether CALS' explicit focus on the interpersonal dimension of lawyering and reducing hierarchy heightens the sense of vulnerability for their clinicians, and makes them more likely to draw lines that may seem less risky to other supervisors. For example, other clinicians explicitly share learning goals with their students early in the semester, and do not feel their authority unacceptably undermined thereby.[65]

In another approach to clinical supervision, Peter Hoffman has advocated a three-staged model of clinical supervision: in the first stage, the supervisor is more didactic and directive, since the student needs substantial guidance; in the second stage the supervisor works to nurture the student's confidence in his own decision-making ability, by treating the student less directively and more as an equal; in the final stage, since the supervisor and student are more like peers, the supervisor defers to the student's judgment and intervenes only to prevent serious error.[66]

In describing the stages of clinical supervision, Hoffman addresses two types of disclosure which play a role in his model of supervision: pedagogical and professional. Hoffman advocates disclosing the supervisory model to the students, arguing that such disclosure "motivates" students to proceed through the various stages.[67] This disclosure of one's teaching goals is what I previously referred to as pedagogical disclosure.

It is interesting, and true, in my experience, that many students are motivated to perform well by the prospect of becoming the teacher's peer. I also think that for many students becoming the teacher's peer means more than simply becoming more proficient at a set of technical skills. Becoming the teacher's peer implies a qualitative change in the student's relationship with the teacher (and a corresponding increase in the student's power) that many students may find attractive and motivating. I find that it is easier for me to be "friendly" and less guarded with the students whom I judge to be performing well. I assume this message is not lost on students for whom my approval or friendship is a motivator. Perhaps the generally less personal and frequently alienating environment of law school makes the prospect of a closer relationship with a teacher seem like a particularly valuable commodity.

In his only concrete example of supervisory dialogue, Hoffman provides an example of what I have termed "professional" disclosure. In a discussion with a student during the second stage, Hoffman helps a student explore options in response to a complaint in a personal injury action. Hoffman tells the student, "I know the attorney for the other

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65. *See supra* note 34 and accompanying text.
66. *Stages*, *supra* note 42, at 309.
67. *Id.* at 311.

side and I am pretty sure she will give us an extension of time to answer."[68] Like much professional disclosure, this seems relatively non-controversial most clinicians would have no objection to doing it and it reveals very little personal information.

Hoffman doesn't address disclosure directly, and talks more in terms of authority and control versus openness and friendliness. However, this model seems to recognize some need to balance the sorts of disclosures that are implied in the supervisor's move from authority figure to peer, with the need to remain in control, even at the final stage. I suspect he would advocate caution in making personal disclosure, particularly in the early stages of the supervisory relationship.[69]

I also find it somewhat telling that Hoffman's article is written in a more abstract style than others who have written about clinical supervision and, in some sense, discloses the least personal contextual information. Just as my own more concrete and personal writing reveals a somewhat greater willingness to disclose, the absence of examples that reveal more about the author and his personal supervisory style reinforces my feeling that Hoffman would be suspicious of a supervisor's disclosure of personal information unrelated to her role as a lawyer.[70]

In another of the leading articles describing the process of clinical supervision, Ann Shalleck describes a form of supervision that endeavors to explore the connections between lawyering and the socio-political context in which it operates.[71] She believes that any lawyering activity can serve as a metaphor for the lawyering process generally, and argues that subjecting any lawyering activity to intense scrutiny can illuminate the lawyering process. Shalleck's description of her supervisory process models her supervisory methodology: she constructs a theory of supervision by examining three supervisory interactions in a single clinic case, and subjecting those interactions to intense scrutiny.[72]

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68. *Id.* at 308.

69. I subsequently did send Hoffman a draft of this article and he generously shared his reactions with me. While he acknowledged that for him "intimacy has not been a particularly important part of the supervisory exchange," he regularly employs connected, pedagogical disclosure. "'[T]hinking aloud' including relating my emotional reactions is valuable teaching by demonstrating or modeling what a good lawyer should do in a particular situation." Letter from Peter Hoffman, on file with the author.

70. This may be another indicia of the significance of gender in clinical supervision. *See* Henley, *supra* note 2, at 8. Hoffman thinks the style of writing reflects little about his supervisory style and attributes the lack of personal examples to traditional law review writing style and the pressures of supervision which at the time he wrote the article precluded more expansive illustrations.

71. Shalleck, *supra* note 39.

72. The case of Jessica Green provides the setting for this analysis of supervision. Ms. Green is a victim of domestic violence who seeks an order excluding her husband

Like Hoffman, Shalleck advocates a form of pedagogical disclosure where the supervisor makes the reasons for her choice of subjects to discuss in a supervision session clear to the student. Shalleck's reason, which is to motivate the student to be patient with the teacher's agenda, is similar to Hoffman's. Shalleck acknowledges, however, that disclosing the teacher's agenda has the potential to derail it by giving the student the opportunity to challenge the project of the teacher, an opportunity the student may not have had in the absence of the teacher's disclosure.[73]

Implicitly, Shalleck acknowledges the relationship between hierarchy and disclosure, and that the supervisor may, in the disclosure of her teaching goals, relinquish some of her authority to her students. Hoffman does not allow for this possibility as a consequence of the supervisor's disclosure. But "allowing the student to transform the teacher's agenda" is a much less risky proposition for Shalleck in the context of a single supervisory encounter, than it is for Hoffman who, in disclosing to students the stages of clinical supervision, is setting the ground rules for the entire relationship. Presumably, if Shalleck, as a consequence of her disclosure to her students, feels uncomfortable with the amount of supervisory authority she has relinquished, she can try to make an adjustment in the next encounter. Hoffman, in contrast, is talking about a fairly critical moment early in the semester. Since his preferred method of supervising his students is in some sense non-negotiable, his disclosure of his methodology is not designed to provoke discussion, or permit alteration of his agenda. The relationship between authority and disclosure is not only that we disclose, but when and how.

On the other hand, Shalleck says that supervisor-student interaction is not itself a focus for inquiry in her model of supervision.[74] In this way, Shalleck distinguishes her view of supervision from the CALS model, where supervisor-student interaction is a focus for inquiry. Presumably then, Shalleck does not comment on supervisor-student interaction, and either explicitly or implicitly discourages students from doing so.

This is another interesting choice, and while Shalleck doesn't provide her reasons for it, one wonders about them. There are parallels, for instance, in supervisor-student interaction and lawyer-client interaction.[75]

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from the marital residence and an order of support for herself and her children. Shalleck describes three supervisory encounters (1) a meeting between the supervisor and Ms. Green's student lawyers which precedes Ms. Green's hearing on her application for orders of eviction and support, (2) the hearing itself, and (3) the supervision session which followed the hearing. Shalleck, *supra* note 39, at 19-65.

73. *Id.* at 183.

74. *Id.* at 185.

75. *See* Peter Margulies, *"The Mother with Poor Judgment and Other Tales of*

It is not necessarily inconsistent with Shalleck's methodology to examine an interaction between supervisor and student. It could be a choice made simply in the interest of efficient casehandling. Certain discussions have greater potential to advance the casework than discussions of student-supervisor interaction. Making certain subjects off-limits, and being the one to say they are off-limits, reinforces the teacher's authority in a way that willingness to talk about these issues would not.

Shalleck cautions supervisors to be vigilant constantly for ways in which they "may be overpowering or subverting the student's experience." Although this comment is directed more at intervention generally than at disclosure in particular, it provides another reason for a supervisor to withhold disclosure.

Maybe there is less risk that the supervisor's disclosure will overpower or subvert the student's experience where the supervisor has endeavored to achieve a more egalitarian relationship with the supervisor. My students urge me to share my feelings and reactions with them, to not hold back. They insist that they can react critically to my ideas and they seem to do so. Maybe this is all just my attempt to justify my own more disclosing style, because the truth is it is often difficult for me to withhold my own reactions. I often have very intense reactions to experiences like the hearing described in Shalleck's article.[76] Sometimes my own insights seem so fresh and so urgent that it is difficult for me to wait for a student to come to his own conclusions about it.

III. Themes of Connection and Separation in Feminist Scholarship and the Insights They Offer Clinicians

Much of lawyering is a process of separation and connection; it is the lawyer who can do both effectively who is the most successful advocate. A lawyer is required in her relationship with her client, to empathize, or connect in a fundamental way.[77] A lawyer must, in order

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the Unexpected": A Civic Republican View of Clinical Legal Education 8 (1993) (unpublished manuscript); Smith, *supra* note 41, at 56.

76. Shalleck's article describes a hearing in which her students represent a battered woman in a proceeding seeking a protective order, an order excluding the abusive husband from the home, and temporary support payments. The students succeed in getting the order of protection excluding the husband from the home, and an order requiring the husband to continue mortgage payments for ninety days. The judge refuses to order support however, although the woman has two small children and does not work outside her home. Shalleck, *supra* note 39, at 32-57.

77. Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Non-Legal Issues and the Interests of Nonclients,* 68 N.C. L. Rev. 213, 229 (1990); David A. Binder, Paul Bergman and Susan C. Price, Lawyers as Counselors: A Client Centered Approach at 32-45 (1991) [hereinafter Lawyers as Counselors]; *see also* Stephen Ellmann, *Empathy and Approval,* 43 Hastings L.J. 991, 1003 (1992).

to be effective, be able to see a problem from her client's perspective, even if that perspective is very different from her own.[78]

In the clinic I teach, we represent clients seeking social security disability benefits. I often observe students evaluating a client's disability claim with reference to the way in which they or their parents, since most of our disability clients are significantly older than most of our students, would react if faced with similar physical challenges. The problem with this perspective is that it fails to account for the subjective nature of pain[79] indeed its severity, since students have not, in general, experienced the pain their clients face.[80] Often, though not always, the student's perspective also discounts the demands of physical labor, and the effects of racism, classism and sexism. To be truly empathetic, a lawyer must be able to evaluate a case from her client's perspective.[81]

Simultaneously, however, a lawyer or advocate must also be able to separate herself sufficiently from her client's perspective to be able to subject the client's story to scrutiny, to gather facts in discovery, to think about the most effective way to present the client's claim to third parties such as judges and opposing parties. In the disability case, it is important not to be so wedded to your client's perspective that you fail to appreciate the initial hostility you may encounter from a judge or agency representative.

I often find students who can either separate or connect very well, but have trouble doing both well. Often issues of connection and separation seem related to gender.[82] For instance, I often find students,

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78. Clinical scholarship (particularly the Theoretics of Practice Movement), feminist legal scholarship and critical race scholarship all emphasize the importance of considering multiple perspectives; *see* Anthony V. Alfieri, *Essay: The Politics of Clinical Knowledge*, 35 N.Y.L. SCH. L. REV. 7, 15 (1990); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1, 31, 39-40, 44, 45, 47, 50, 55-56 (1990); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RTS. CIV. LIB. 323, 325, 331, 359, 391 (1987); Kimberle Williams Crenshaw, *Forward: Toward a Race - Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3 (1989); Ellman, *supra* note 77, at 1003.

79. Aubeuf v. Schweiker, 649 F.2d 107, 111-112 (2d Cir. 1981) (citing Marcus v. Califano, 615 F.2d 23, 27 (2d Cir. 1979)); Ber v. Celebreeze, 332 F. 2d 293, 299 (2d Cir. 1964).

80. *See* Jack B. Weinstein, *Equality in the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 899 (1984) (eloquent discussion of how disability cases pose similar dilemmas for judges).

81. *See* Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1618, 1622, 1625, 1649 (1991); Ellman, *supra* note 77, at 992; Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459, 475 (1992); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 212-13 (1991).

82. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL DE-

frequently, though not exclusively, white, middle-class male students, who have trouble empathizing with their clients often poor, female, or people of color. Occasionally, the same student is quite effective in courtroom settings. I have had students who could, for example, stand up to harsh and public criticism by a judge, and be totally unfazed, yet have difficulty understanding a client's concerns.[83] Similarly, I have had students who were quite empathetic and effective with clients, but who were so conscious of the opinions of others that they were flustered in the courtroom or even unable to speak in class for fear of their classmates' reaction. Often, these are female students. I would be very concerned how such a student would react in the face of a judge's rebuke.

In the first case, the student's ability to separate himself from the judge's perspective may be crucial to his ability to maintain his poise in the courtroom and his ability to evaluate the judge's behavior critically later. On the other hand, he was unable to connect with his client's perspective sufficiently to understand him. In the second case, the student was so connected to what her classmates thought that she was quite literally unable to find her voice in the clinic seminar.

Some of the dilemmas surrounding intimacy for me involve questions concerning when to attempt to connect with and when to separate from my student's perspective. I am convinced, for example, that the students I criticize as insufficiently empathetic are the same students I have trouble empathizing with. And similarly, I wonder whether I need to "separate" better from female students who have trouble doing so? In each case, the ability to model connection and separation effectively imparts important lawyering messages for students.

I have found the metaphors of separation and connection helpful in thinking about my relationships with my students, and in reflecting on my choices concerning self-disclosure. Because feminists pose resolutions of the tension between separation and connection, I have found that feminism has been useful in resolving the tension I feel around issues of intimacy and distance with my students.

That feminism offers clinicians assistance in analyzing the way in which distance and intimacy operate in a clinician's relationship with

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VELOPMENT AND MORAL THEORY (1982); Bryant, *supra* note 81, at 479. *But see* Angela Y. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588, 591 (1980); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 8 (1987).

83. The judges in the United States District Courts where my students practice are overwhelmingly white and male. Conceivably, the social class and power disparity between the student and the client may be greater than that between the student and the judge, making the judge seem not nearly as forbidding as he might to a student whose experiences were closer to those of the client.

her students should not come as a surprise. The epistemological and methodological similarities between feminism and clinical teaching have already been well documented.[84]

What follows are three examples of models posed by feminists of the resolution of separation and connection, and some thoughts from my supervisory experiences concerning how these models might translate for a clinician's relationship with her students.

A. Separation and Connection in Mothering and the Lessons for Clinical Teaching

The feminist philosopher Sara Ruddick in her book, *Maternal Thinking*, offers an aspirational account of mothering and the distinctive thinking that arises from the work mothers do.[85] Ruddick identifies the three essential tasks of mothering as: 1) preserving the child, 2) fostering his growth and 3) socializing, or making the child acceptable to society.[86] In each of these tasks mothers are required to connect with and separate from their children. It is in socializing, however, that the tension between connection and separation is greatest.

Ruddick recognizes that mothers occupy positions which are simultaneously powerful, vis-a-vis their children, and powerless, vis-a-vis other persons and institutions in society.[87] Socializing therefore poses "painful contradictions for mothers."[88] Mothers want their children to be able to negotiate in the world without continually getting into trouble with people who have the power to hurt them. At the same time, these mothers may not want their children to accept society's dominant values unquestioningly.

Mothers could, and often do, respond by viewing their children as having essentially hostile natures that require domination and control. They could, and often do, exert their maternal power and authority to demand unquestioning obedience of the child. Children can also yield,

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84. Goldfarb, *supra* note 81, at 1637-42.

85. SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE (1989) [hereinafter RUDDICK]. The following discussion is drawn largely from Ruddick's work.

86. Throughout my discussion of Ruddick's work, I use the male pronoun to refer to the child, and the female pronoun to refer to the mother. Ruddick consciously chose to focus on "mothering" rather than "parenting" or "caregiving." Ruddick recognizes that mothering is "potentially work for men and women," and that some men in fact perform some mothering work. RUDDICK, *supra* note 85, at xi; 40.

87. *Id.* at 35. *See also* Martha Fineman, *The Neutered Mother,* 46 U. MIAMI L. REV. 653, 654 (1992) ("[T]he symbol of Mother is negatively implicated by the specter of her dependence on husband and child. She is married by burdens of obligation and intimacy in an era where personal liberation and individual autonomy are viewed as both mature and essential.").

88. *Id.* at 104, 109, 114, 115.

just as unquestioningly, to the authority of fathers, school officials and powerful others. Mothers can also completely accept their children's behavior, without recognizing any need to control it, or fail to do so despite recognizing the need.

Ruddick proposes an alternative form of socializing she calls "training as a work of conscience," as a way of reconciling these contradictions. The goal of this training is the growth of children as "conscientious" persons, capable of judging against as well as with dominant values.

Ruddick's method requires "conversational reflection" in which the mother, rather than dominating her child or accepting every behavior without criticism, nurtures a responsiveness in him. This method requires ongoing mutual trust; that is, the mother must trust her child to instill the child's trust in her. This trust helps keep the dialogue from becoming coercive, or at worst, minimizes the damaging effects of coercion. Trust must not be so complete that a mother fails to recognize a child's occasionally manipulative and meanspirited behavior, yet a mother must not be forever suspicious of her child. Similarly, the child must be able to recognize and protest his mother's betrayal in order to affirm that she was once and will again be trustworthy. In order for this to happen, a mother must acknowledge her failings and work against them. The appropriate degree of trust then, is an ongoing struggle.

Training as a work of conscience forges a unity of goal and method. A mother models the conscientiousness she tries to develop in her child. When she seeks and trusts the authority of others, for example, she takes responsibility for judgments of trust while keeping respectful distance from the authority judged trustworthy. This form of training requires both intense connection as mother and child develop the bond on which trust is based, and temporary, necessary separation as that bond is tested when parent or child stand back to examine the other critically.

Clinical legal education is often looked upon as the same sort of "training" that mothers are called upon to do.[89] For example, the legal profession asks law schools to train students to be "acceptable" members of the profession. Legal educators rail at this task, viewing their goal not "training" as narrowly defined by the profession, but rather a broader view of the educational mission.[90] To the extent, however, that

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89. These parallels between mothering and clinical supervision have also been described in the therapist-client relationship. "The nature of the intimacy established between a primary caretaker and an infant, as well as between a therapist and a client, can be seen to involve the handling, within the relationship, of complex interrelated issues around nurturing and individuation." Sandra Beth Levy, *Toward a Consideration of Intimacy In the Female/Female Therapy Relationship*, 1 WOMEN & THERAPY 35, 37 (1982).

90. *See generally* Jack Himmelstein, *Reassessing Law Schooling: An Inquiry Into*

law schools attempt to satisfy the profession's expectations that law students be trained, that task falls to clinical law teachers and teachers of lawyering skills, who are often one and the same.

Furthermore, there are parallels between the simultaneously powerful and powerless positions of mothers and those of clinical law teachers. Supervision in the clinical setting, like mothering, is a conflictual status of power and powerlessness.[91] Clinicians hold power over students but often hold positions in the institution and the profession which are relatively less powerful.[92]

In the descriptions of clinical supervision in the literature on clinical legal education, the clinical teacher hopes her student will acquire skills necessary to succeed in the existing system while developing the tools to critique both the system and her role in it to preserve the possibilities for transformative change.[93] Similarly, when clinical teachers ask their students to critique the models of lawyering they teach their students, indeed when they encourage students to critique the teacher, they need to create the trust that empowers the student's voice. Because of the power disparities inherent in the student-teacher relationship, this trust, like that between mother and child, is an ongoing and difficult struggle.

My interaction with one female student illustrates this struggle. The student was drafting a complaint in a civil rights case. In reviewing the draft, I emphasized the need for "spare" pleading which leaves open as many options as possible in developing the case theory depending on the facts learned in discovery. I also questioned the student's decision to plead several harmful facts, since they were not necessary to establish the cause of action. The student had included the harmful facts because she felt that leaving them out gave the reader an incomplete and potentially misleading understanding of what had occurred. The student agreed to take out the harmful facts, although she questioned the honesty

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the Application of Humanistic Educational Psychology to the Teaching of Law, 53 N.Y.U. L. Rev. 514 (1978).

91. As Fineman has noted with respect to mothers, it may be the burdens of obligation and intimacy which effect the perceptions of clinicians in the institutions they serve. Fineman, *supra* note 87, at 654.

92. Ruddick describes mothers as profoundly ambivalent about their conflictual status. Ruddick, *supra* note 85, at 68-69. Clinicians may be equally ambivalent. *See* David Barnhizer, *A Clinical Carol or the Spirit of Clinical Future, Remarks Before the Annual Meeting of the Clinical Legal Education Section of the Association of American Law Schools (AALS)*, in AALS Clinical Legal Education Newsletter, Mar. 1987, at 9. (describing clinicians who lost touch with the reformist roots that originally brought them to clinical teaching in the interest of becoming more powerful).

93. *See generally* Carrie Menkel-Meadow, *Two Contradictory Critiques of Clinical Legal Education: Dilemmas and Directions in Lawyering Education*, 4 Antioch L.J. 287 (1986).

of doing so, saying, "I'm becoming the kind of lawyer my mother wouldn't approve of."

I was very troubled by this comment, never having perceived previously a conflict between honesty in advocacy and the rules of good pleading. I thought, however, that while the student's view of honest advocacy would disadvantage her client in the system as it currently exists, the student and her mother may have had a point. I shared my concerns with the student.

I told the student I thought it was important that she understand how the system defined competent lawyering skills, while continuing to look at the system as critically as she was. I also told her I was troubled that I could be perceived as encouraging her to become the kind of lawyer her mother would disapprove of, and that, apparently, I *was* the sort of lawyer her mother would disapprove of.

I nevertheless felt that, having considered the options, including whether we might look better to the court having pleaded the harmful information and whether this outweighed the disadvantages of disclosing the information, leaving out the harmful information was best for the client. The student apparently felt the same. At least she said she did. Thereafter, the student and I frequently engaged each other on the "honesty" of various courses in litigation, using "how would your mother react to the ethics of this?" as the standard.[94]

B. Integrating Connected and Separate Knowing and the Lessons for Clinical Teaching

Women's Ways of Knowing,[95] represents a groundbreaking attempt to identify and categorize the different ways that women acquire knowl-

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94. Robert Condlin might use this anecdote in his critique of live client clinicians' use of "persuasion." Robert J. Condlin, *"Tastes Great, Less Filling": The Law School Clinic and Political Critique,* 36 J. LEGAL EDUC. 45, 48 n.7 (1986). *But see* Eric S. Janus, *Clinics and "Contextual Integration": Helping Law Students Put the Pieces Back Together Again*, 16 WM. MITCH. L. REV. 463, 489, (1990) (criticizing Condlin as endorsing a false objectivity).

I question whether persuasion would fairly characterize my interaction with this student. For one thing, I continue to question the "conventionalness" of my choice; if the student's mother truly believed the ethical course required disclosing the information, why didn't I? The "maternal" standard here resembles that described by William Simon as a regulator, one for whom duties to the system outweigh any duty of loyalty to the client. *See* William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1086 (1988) (My own instincts often tend toward those Simon would describe as "libertarian;" a libertarian would certainly leave the harmful information out, unless doing so would harm her client.). Simon's model of Ethical Discretion might justify this decision on the relative power disparities of the parties—the client for whom we were writing the complaint was a poor woman and her adversary a powerful corporation.

95. MARY FIELD BELENKY, BLYTHE MCVICKER CLINCHY, NANCY RULE GOLDBERGER, JILL MATTUCK TARVLE, WOMEN'S WAYS OF KNOWING (1986) [hereinafter WOMEN'S WAYS].

edge. For most women, according to the authors, higher education serves a function of offering women formal structures for acquiring and analyzing information. These formal structures can be of two types. One type, "separate knowing" emphasizes critical thinking, looks for logical inconsistencies, and extols reason. "Connected knowers" in contrast gain knowledge through empathy; thus, they develop procedures for gaining access to others' knowledge.

1. Separate Knowing and Traditional Legal Education.—Traditional legal education privileges separate knowing. Most of law school, particularly in the first year, emphasizes abstract, decontextualized modes of reasoning.[96] Even the traditional teaching of professional responsibility emphasizes resolution of ethical dilemmas by reference to the Code of Professional Responsibility, an abstract rule approach to the resolution of problems often having moral dimensions.[97]

Furthermore, the setting of such courses emphasizes the notions of hierarchy, and exclusion of self that characterizes most courses in professional responsibility, indeed much of law school.[98] Classes are taught in large groups in raked lecture halls, lead by an "expert" professor whose ability to know students personally or interact with them individually, much less intimately, is limited by the number of students in the class and the barriers imposed by the classroom design.[99]

Even in the most "open" law schools, interaction between faculty and students is limited by the size and design of most law school classrooms. I have heard students, particularly in the first year, describe the ring of students that forms around the professor after such large classes. The students approach the professor with "questions" ostensibly, although it sometimes seems that certain students long more for interaction with the professor than have a pressing need to have a question answered. The "inner" ring is largely composed of students, who like the professor, are often white, heterosexual, and male. Students of color, gay and lesbian students, and women students approach the professor,

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96. Himmelstein, *supra* note 90, at 534; Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1305 (1988).

97. *Id.* at 520-21 (Jack Himmelstein notes that neither stricter ethical codes nor courses on professional ethics address "a critical consideration of the lawyer's role, and of the human and social concerns underlying that role."). *See also* Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159, 1162 (1992) ("The effect, and it is fair to say the effort, is to separate the lawyer and her own ethical sensibilities from the broader social work in which she will function.").

98. *Id.* at 533, 536-39; Weiss & Melling, *supra* note 96; Unhappily, this description has also been applied to universities and colleges. Margo Culley, Arlyn Diamond, Lee Edwards, Sara Lennox & Catherine Portugues, *The Politics of Nurturance in* GENDERED SUBJECTS 11 (Margo Culley et al. eds. 1985).

99. *See, e.g.,* Himmelstein, *supra* note 90, at 534.

if at all, on the outskirts of the ring. As the professor runs out of time to answer the questions of all the students, it is the students on the outside which are most often left unaddressed.[100]

It is not surprising then, though it is ironic, that for many students, their first individual conversation with a law faculty member who teaches such a class is when and if the student meets with the faculty member after she receives her final grade for the course.[101] I recall overhearing one student describe such a conference, "I never really spoke with [the professor] before. I was so surprised to find out he was so nice." Whether or not clinical students would describe their clinical teachers as nice, they usually have some basis for making such a judgment before they talk to her about their final grade.

2. Clinical Education and Connected Knowing.—In contrast to traditional legal education, clinical education emphasizes at least two modes of teaching, both of which bring students into closer contact with their professors.[102] Each of the modes of teaching in which clinicians are engaged emphasize relationships with,[103] and among,[104] students.

Most clinical programs include a classroom component which emphasizes more interaction among students and teachers than is the case in the traditional classroom.[105] Clinical classes are generally smaller than most non-clinical classes.[106] There is generally more interaction among students and between students and teachers than is the case in non-clinical classrooms. Student teacher interaction is achieved in part by a curriculum which encourages students to engage in simulations and role plays and to critique their own performance and that of their classmates. Students often receive individualized feedback on their performance in role from teachers and classmates. The development and maintenance of trust is an explicit goal of the clinical classroom.[107]

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100. *See* Alice Dueker, *Diversity and Learning: Imagining a Pedagogy of Difference*, XIX N.Y.U. REV. L. & SOC. CHANGE 101, 104-05 (1991-92).

101. *See* Carney, *supra* note 21, at 31 (an assessment of the effects of this form of teaching on law students' mental health).

102. *See Stages*, *supra* note 42, at 301-02. *See also The Learning Contract*, *supra* note 20, at 1051; Shalleck, *supra* note 37, at 2.

103. Shalleck, *supra* note 39, at 2.

104. *Id.* at 120.

105. Meltsner & Schrag, *supra* note 25, at 31.

106. Marjorie McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand their Beachhead*, 35 N.Y. L. REV. 239, 254, 283 (1990) (comparing the 1:8 average student teacher ratio in in-house clinics to the 1:23 ratio in all other law school courses).

107. While it has failed to overcome the bias of legal education or legal institutions, clinical education has frequently challenged law schools to examine biases within law school and the legal profession. *See* Susan J. Bryant & Victor M. Goode, *Racism and*

The second mode of teaching in which clinical teachers are engaged, one on one supervision, is at least as important as the teaching which occurs in the classroom. In supervision, student teacher interaction is even more individualized than in the clinical classroom. Most clinical faculty have regularly scheduled meetings with the students they supervise, either individually, or in groups of three or fewer. In addition to these formal meetings, faculty interact with students informally on an almost daily basis in the clinic office, or elsewhere, as the teacher assists the student plan, reflect on or carry out lawyering activities. Relationships between students and teachers inevitably develop through this daily interaction.[108]

3. Constructed Knowing: Integrating the Voices.—In contrast to knowing which is exclusively separate or connected, *Women's Ways of Knowing* identifies a third form called "constructed knowing" which represents a synthesis of separate and connected knowing.[109] Constructive knowledge is characterized by an ability to relate with the information learned and test it against one's experience and to take what is learned outside oneself and compare it against an external standard.[110]

Constructed knowing is promoted through teaching which models for students a way of achieving the integration of connection and separation. "Constructive teaching"[111] acknowledges that students learn not simply through the subject matter taught, but that teachers impart important lessons through their interaction with students.[112] Constructive teaching, therefore, includes opening up your process for the student's

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Sexism and Their Effect on Supervision, PANEL DISCUSSION AT THE AALS NATIONAL CLINICAL TEACHERS' CONFERENCE (Colo., May 19, 1986); Mary Jo Eyster, *Analysis of Sexism in Legal Practice: A Clinical Approach,* 38 J. LEGAL EDUC. 183 (1988); Suellyn Scarnecchia, *Gender & Race Bias Against Lawyers: A Classroom Response,* 23 U. MICH. J. L. REFORM 319 (1990).

108. These relationships have the potential to respond to critiques of legal education as destructive to law students' self esteem. Carney, *supra* note 21, at 10.

109. Weiss & Melling, *supra* note 96, at 1307, describe constructive knowers among the women in their law school class "as [those who] know [they] can take any side of a legal argument and knowing they want to now find the argument that [they] want to believe in and then argue that."

110. It is unfortunate that WOMEN'S WAYS of KNOWING's categories take on a hierarchical quality, that seems to reflect some class bias. Most of the examples of "Silent Women," the lowest category, were lower class women. On the other hand, most of the examples of "constructed knowers" were students at or graduates of "elite women's institutions." WOMEN'S WAYS, *supra* note 95, at 93, 103, 131, 190-91.

111. Although the authors call this type of teaching "connected" I am avoiding that term to emphasize the goal of truly integrating separate and connected knowing rather than privileging connected knowing over separate. *Id.* at 223-29.

112. *See* Dueker, *supra* note 100, at 131 (arguing the value of connected teaching in the law school classroom).

scrutiny. Allowing a student to watch a teacher solve and fail to solve problems can be a powerful learning experience, and empower students to take on solving problems themselves.

I once supervised a student appellate argument in a case I had supervised for a number of years. I had tried the case with different clinic students a year earlier. We won a significant verdict at trial, only to have the trial judge grant our opponent judgment notwithstanding the verdict. As we got closer to the date of the appellate argument, I became increasingly nervous. We had had a number of practice arguments, and I was disappointed in the progress of the student's performance. The student's performance was competent, and I had little doubt he was capable of a good argument, but after each practice argument, we talked about the changes we wanted to make in the next practice argument, and few of those changes seemed to be getting made. I was also having a very hard time restraining myself. I really wanted to do the argument myself.

The day before the "real" argument, we had not scheduled a practice argument, but I asked the student to meet with me anyway. We talked about his expectations for the following day, summarized some of the practice questions that had been especially difficult, and agreed on the best way to approach those questions. During our conversation, the student asked me whether it was difficult for me to let him do the argument.

I could have deflected the question, saying, "that's what clinical teachers always do," or minimized the issue saying, "It's always hard, but's it's my job to help you do it, not to do it myself." Students have asked me this question before. I had answered it similar ways in the past and the answer usually seemed satisfactory—even true. Instead, however, I admitted that it was especially hard for me to let go of this argument, that I felt very committed to the client, and was very invested in the outcome, probably more so than he.

I was concerned that my difficulty letting go of the argument not become the student's problem, and I shared this concern with the student as well. I was also concerned that the student not use my problem as an excuse for disregarding my feedback. The student said he had sensed my inability to let go of the argument in my supervision of him. While this was undoubtedly true I told him, I was genuinely concerned that he was not incorporating the feedback he had been receiving, and I wanted him not to discount my suggestions just because I was also having a problem letting go of the case.

The student's performance at oral argument the following day was inspired, as good as any I have ever seen. There may well have been no connection between our conversation, my disclosure, and his performance. His performance may have been attributable to the "luck of

the day," as his less successful performances in the practice sessions may have been. Or it may be, as he assured me throughout the process, that he could only "pull it together" at the last minute. It may be however, that he needed to hear me acknowledge my difficulty letting go, because he could hear it whether or not I acknowledged it.[113] It may be that he was so distracted by my obvious desire to do the argument myself, it was difficult for him to focus on anything else.[114]

The constructive teacher is one who helps students articulate and expand their latent knowledge. The constructive teacher enters her student's perspective, but does not abandon herself to it.[115] Her role does not entail power over students, but does "carry authority, an authority based not on subordination but on cooperation." [116]

A dilemma faced by a male student litigating a sexual harassment case on behalf of a female client illustrates this integration of separation and connection. The student was involved in face to face negotiations to settle a pretrial order with his opponent, a male lawyer. During the course of the negotiations, the lawyer repeatedly made disparaging remarks about the client's character, remarks which undoubtedly would have offended the client had she heard them. Indeed the student admitted that he had been offended by them, yet he said nothing to the lawyer.

In a subsequent supervision meeting, the student expressed disappointment that he had not "defended" his client against his opponent's remarks. He felt that in failing to respond, he had been disloyal to his client.

I explored with the student the reasons for his reluctance to confront the lawyer's disparagement of his client. The student felt he could not respond to the lawyer's remarks without detracting from the completion of the pretrial order. He felt it may even have been helpful to establish

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113. LAWYERS AS COUNSELORS, *supra* note 77, at 39.

114. At the risk of being criticized for justifying something that has good for me as good for the student, once I acknowledged my difficulty "letting go" to the student, I felt better able to do it. I think it is very possible that he couldn't do the argument well until I moved out of his way. The student reflected some time afterward as follows: "I can only agree that the reasons you offer are possible because I still have no idea what the cause of my problem was. I would like to think that I knew I would "pull it all together" in the end, but I know better. The pressure of the task was the most intense I had ever experienced. I was frustrated that I was not performing up to your [or my] expectations, knowing the substantial effort you had made for [the client] and that this was her last chance in the courts. Your disclosure must have had some positive effect on me based on my performance, but so many thoughts were running through my head that I could not assign responsibility to a particular occurrence. Most likely, a part of each of the possible reasons discussed played a role in the process." Letter from former student on file with the author.

115. WOMEN'S WAYS, *supra* note 95, at 227.

116. *Id.*

an atmosphere where the lawyer felt free to make insensitive remarks about the client. Permitting the lawyer to speak so freely might have given the student an insight into the lawyer's theory of his case. He also admitted, however, that his joint work with opposing counsel on the pretrial order created a sort of allegiance with the lawyer that excluded the client. Concerned about this, the student spoke to his adversary, and the completion of the pretrial order was not adversely affected.

The student needed to be able to separate, or impose some distance in his relationship with his adversary so he felt less reluctant to call him on his inappropriate remarks. Or, conversely, he needed to be able to maintain his connection with his client even though he was engaged in the kind of lawyering task which normally requires one to separate oneself from the client.

Paralleling the student's relationships with his client and his adversary, the supervisor's relationship with the student needed to be sufficiently close for the student to safely expose his misgivings about his conduct with the lawyer, while distant enough to subject his actions to scrutiny, with his supervisor's support.

C. Separation, Connection and the Integration of Justice and Care

The feminist psychologist Carol Gilligan in a work now familiar to most law teachers identifies the different moral "voice," that often characterizes women's decision making.[117] Whereas the leading theorists, in particular the psychologist Lawrence Kohlberg had hypothesized that higher order moral decisionmaking required the application of a hierarchy of abstract rules, Gilligan notes that these theories were reached through studies of male subjects. In applying Kohlberg's research to women, Gilligan uncovered a different mode of reasoning which emphasized relationships over rules as a way of resolving moral dilemmas. Legal scholars, in particular feminist legal scholars, have come to recognize this "different voice" as an ethic of care.

In subsequent research, Dana and Rand Jack sought to elucidate the lawyer's notion of professional responsibility by listening for justice/rights (reasoning through resolution of competing abstract principles) and care (reasoning through attention to self and other) themes in their interviews of lawyers.[118] They concluded that the notion of ethics adopted by most of the lawyers in their study included both justice and care themes, and that these competing moral visions worked together for the lawyers in their study in resolving moral dilemmas the lawyers encountered. They noted, however, that when particular ethical dilemmas brought

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117. GILLIGAN, *supra* note 82, at 24-63, 128-74.

118. MORAL VISION, *supra* note 18, at 13.

justice and care concerns into sharp conflict the lawyers seemed to resort primarily to one mode or the other to resolve the conflict. To this extent, women were somewhat more likely to rely on the care mode to resolve the dilemma, while men were somewhat more likely to rely on the justice mode.

The effect of law school's emphasis on abstract analysis in producing "detached, neutral, partisan stoics who think like lawyers and share the assumptions of professional ethics" is well documented.[119] In suggestions for educating a "more morally responsive advocate," Jack and Jack suggest reform of law school teaching methods, which in modeling combative lawyering behavior, encourage the archetype of the adversarial lawyer who approaches his professional role and the ethical dilemmas he faces by resort to the rigid application of rules, without regard for the morality he brought with him when he entered law school.

Furthermore, the separation of self which characterizes much of legal education may give messages about the relationship between distance and power which are mirrored in the legal system.[120] The higher status, elite forms of practice (federal litigation, corporate deals, e.g.) are treated as discrete bounded interactions, as compared to the "messiness" individual representation in family court, housing court, or criminal court with its "recidivist" component.

The legal profession accords elite status not only to certain forms of practice but to those lawyers with the means to distance themselves from clients. Large law firms with legions of associates and staff divorced from the actual client have more status, for example, than the solo practitioner engaged in closer relationships with individual clients. The federal prosecutor who is immune from the pressures of the community is more powerful than the local district attorney. Indeed, arguably the most powerful actors in the legal profession, judges, are the most distant. Appellate judges are have more power than trial judges, and perhaps not coincidentally are more distant from the controversies and litigants they judge than are trial judges. The justices of the United States Supreme Court are the most powerful actors in our legal system but are the most distant from the litigants and controversies which come before them.[121]

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119. *Id.* at 44-45.

120. These messages are mirrored not only in legal institutions but in law itself. *See, e.g.*, Nedelsky, *supra* note 47, at 167 (a discussion of the preoccupation with separateness and the pervasiveness of boundary metaphors in American constitutionalism).

121. Of course, distance and power are not synonymous, and the powerful actors and institutions I cite are not powerful simply by virtue of their greater distance. But the relationship between distance and power is more than coincidence and the ability to distance oneself is one incident of power. The reaction of some of the Justices of the Supreme Court to the release of Justice Marshall's personal papers suggests that the

Feminist legal scholars remind us that traditional legal reasoning denies the value of connection, intimacy and care, while feminists simultaneously celebrate connection and fear connection's invasive or oppressive potential.[122] As the aspiration toward explicit recognition and integration of care based (connected) and rule based (separate) values seeks to improve our legal system, a clinical teacher can integrate distance with intimacy in her relationship with her students, as a check on intimacy's oppressive or invasive potential.

To the extent that teaching methodology influences the kind of professional who emerges, a point urged by Jack and Jack in their call for reform of the law school curriculum, clinical pedagogy promotes creative thinking which values divergent views and fosters cooperative learning to a greater extent than the traditional law school methodology. Thus, clinical teaching models for students a place for care values in the legal curriculum, and by implication in their professional lives.

Furthermore, to the extent that clinical teachers engage in relationships with students that are not only distant, but intimate, the methodology of clinical teachers has a powerful potential for offering students ways to integrate an ethic of care with an ethic of rights in their approach to moral problems. The ethic of care requires neither the exclusion of one's own needs, nor exclusion of the needs of others in resolving moral issues. Clinical teachers by integrating both distance and intimacy in their relationships with students, can offer a model for integrating "justice" concerns with care concerns—that care-based thinking, the connected self, is no less just, and justice based thinking, the separate self, is no less caring.

In urging that a course that looks and feels more intimate gives positive messages about the value of care concerns in resolving moral dilemmas it may be useful to share a conversation with a student I will call Ellen. Ellen thought everyone in the clinic seminar regarded her as "crazy" during a class discussion of whether to take a case involving the government's attempt to seize the public housing apartment of a women indicted on narcotics charges. Ellen had urged that the clinic should accept the case because otherwise a woman and her two small children would be rendered homeless; that is, that the potential harm itself justified taking the case. In the discussion of the case in the clinic seminar, most of the students who advocated taking the case did so because of the perceived important constitutional principles involved:

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members of the Court are acutely aware of the relationship between distance and power. *Chief Justice Assails Library on Release of Marshall Papers*, N.Y. TIMES, May 26, 1993, pg. 1, col. 1.

122. West, *supra* note 6, at 53-61.

i.e., that the government's attempt to take the women's property (in this case her public housing apartment) violated the woman's constitutional right to "due process" by not affording her a pre-seizure hearing. Some students were concerned about whether the proposed client was "really guilty" of the narcotics offense she was charged with and thus would lose her apartment even if she got a pre-seizure hearing, and that the "drug crisis" plaguing our country justified such action anyway. Ellen felt many of her classmates, particularly her male classmates, disrespected her reasoning. She questioned it herself.

Ellen's reaction to her classmates troubled me in at least two respects. First, I thought the class discussion had been valuable precisely because it raised both "rights" concerns and "care" concerns. Ellen's feeling that many members of the class ridiculed her concern that the prospective client and her children had become homeless, and that this should play a role in any decision regarding whether to take the case, was thus a matter of concern. Furthermore, I was concerned that Ellen's perspective or any student's perspective not be silenced by the reaction of certain class members.

I urged Ellen that her concerns were important, both in enriching the class discussion and in informing her work as an advocate, in the clinic and in her future career as a lawyer. We also talked about the importance of asserting such concerns even in the face of other's ridicule. I also spoke individually with the other students in the seminar, however, about taking responsibility for behavior that might inhibit the expression of opposing views.

Later that semester, an incident involving my students occurred in a joint clinic class. [Several times each semester my clinic students attend class with the students in other clinical programs in our law school.] Some of the students from other clinics made presentations to the group, after which the floor was opened for questions. After a presentation by students who were defending police officers in a civil rights action brought by a *pro se* plaintiff, several of the students in my clinic questioned the student defense lawyers as to why limited clinic resources should be used to defend police officers accused of brutality. Some of these were the same students who had earlier ridiculed Ellen. Although many of the students in the class were sympathetic with the viewpoint such questions expressed, some objected to the way the student defense lawyers had been challenged.

In response to this incident, Ellen designed and presented the following week's class for our clinic called, "The Student Lawyer as Perceived by Others." Although the class was planned by a group of students, the impetus for the class came from Ellen. In the class, the clinic students participated in a roundtable discussion in roles as clinical teachers, secretaries, clients, adversaries, co-counsel, "significant others"

and students from other clinics. One student, modeling himself after a traditional law school professor, moderated the discussion.

In collaborating with her classmates, some of whom were the very students she felt had ridiculed her earlier, Ellen was able to find a place for her care based instincts and was successful in getting members of the class who earlier had denigrated her reasoning to accept its value. The students who participated in the class were shocked to learn they had been perceived as insensitive to the students in other clinics, and concerned about the reaction, set about to repair the damage to their relationships with those students.

IV. Conclusion: A Reflection on the Effects of a Search for Balance Between Distance and Intimacy in my Own Supervision

What have the effects of my examination of intimacy been in my own supervision? Since beginning this project, I have become more self conscious of my relationships with students. I am more reflective about my choices to disclose to students, and more reflective about the circumstances under which I ask them to reveal something to me.

As a result, I have become slightly more cautious about how much and in what ways I reveal myself to students. This is particularly true in the early stages of my relationship with a student. I no longer, for example, show pictures of my child to my students when I first meet them, although I show them quite freely in personal social settings. I tend to take more cues from my students concerning when to reveal personal information. I volunteer information less often, and what I do reveal is usually revealed in response to a student question.

Having come to a greater appreciation of the relationship between gender, authority and disclosure, and having recognized that some of my dilemmas around intimacy involve questions of power and control, I think the choice to hold back slightly more is a good one for me. Even so, since I came to this project thinking intimacy is a good thing in clinical supervision, I find my reaction to hold back a little more at the beginning an odd one. I suspect that I will be making corrections continuously along a spectrum of disclosure and openness, that reflect changes in me, in my students or in my perceptions of them, and in my understanding of the dynamics affecting our relationships.

Although I am slightly more held back personally than I used to be with students, I am at least as willing as I used to be to share reasons for pedagogical choices with them. This seems especially true for me in selecting students to participate in the clinic. I am much more conscientious than I used to be about articulating for students the bases of our pedagogy, making sure students understand my expectations of them and my reasons for those expectations.

With respect to disclosure that is neither purely personal nor pedagogical, I try to impose a connection test throughout my relationship with students, in deciding whether to share information about myself or in reflecting on choices I have made concerning disclosure. This is not to suggest that I am constantly in control of my interactions or my conversations, or even that I want to be. In retrospect, however, it is the unconnected choices that I fault myself for most, like the choice to show the new students the pictures of my baby.

I think I have always been more patient and cautious about asking students to make disclosure than I have been about making it myself, and I continue to be that way. I have a somewhat greater appreciation of the hidden ways teachers can coerce disclosure from students, however, and am more conscious of my power over them than I used to be.

Mirroring many of the issues in my supervision, the process of writing this paper has been a process of separation and connection, "doubting and believing"[123], choices about when to disclose, how much my stories intrude on other's privacy, and when to hold back. Mediating my own impulses to reveal and to hold back in this article has also, no doubt, taught me about how to mediate those issues in my supervision in ways that will continue to reveal themselves to me. Having asserted this, it is time for me to let go of this paper, get back to supervision, and test out my assertion.

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123. PETER ELBOW, WRITING WITHOUT TEACHERS 148-49, 190-91 (1973).

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NOTES

The Retention of Severance Benefits During Challenges of Waivers Under the Age Discrimination in Employment Act

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INTRODUCTION

The establishment of minimum standards for valid unsupervised waivers of age discrimination claims by the Older Workers Benefit Protection Act of 1990[1] followed a history of controversy[2] involving the courts, the Equal Employment Opportunity Commission (EEOC) and Congress over the validity of such waivers under the Age Discrimination

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1. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified at Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (Supp. 1993)) [hereinafter the OWBPA]. This Note is concerned only with Title II of the OWBPA, dealing with waivers of rights or claims. Title I of the OWBPA overruled the Supreme Court's decision in Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989), *cert. denied*, 498 U.S. 963 (1990), to restore ADEA coverage of employee benefits. In *Betts*, the Court held for the first time that the ADEA applied to only a narrow range of employee benefit programs, which effectively allowed employers to discriminate on the basis of age with regard to other employee benefits. Title III of the OWBPA consists of a severability clause, stating that if any provision of the OWBPA is held to be invalid, the remainder of the Act will not be affected.

2. *See generally* SENATE COMM. ON LABOR AND HUMAN RESOURCES, 102D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT (Comm. Print 1991).

in Employment Act of 1967.[3] An unsupervised waiver[4] under the OWBPA refers to a waiver of rights or claims arising under the ADEA which an individual has executed without the supervision of a court or the EEOC.[5] Although Congress resolved the primary controversy regarding the enforceability of private ADEA waivers by amending the ADEA with the OWBPA to codify the elements of a valid unsupervised waiver,[6] neither Act addresses the following issues: (1) whether retention of severance benefits constitutes ratification of an otherwise voidable unsupervised waiver under the ADEA unless the individual tenders back the benefits to the employer within a reasonable period of time following execution, or (2) whether retention categorically precludes a subsequent suit. As a result of the statutory omission, a split of authority has developed between the Eleventh Circuit Court of Appeals[7] and the Fourth[8] and Fifth[9] Circuits that threatens to thwart the specific requirements and general purposes of the OWBPA, making the enforceability of waivers of age discrimination claims uncertain.

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3. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988) [hereinafter the ADEA]. All references to sections of the ADEA in this Note are to Title 29 of the current United States Code.

4. The scope of this Note with regard to the law of waivers is limited to unsupervised waivers of claims arising under the ADEA as described in Title II of the OWBPA. The term "waiver" will be used synonymously with "release" for the purposes of this Note. Although the common law of contracts allocates different meanings to "waiver" and "release," the courts, Congress and the administrative agencies have used interchangeably the words "waiver" and "release." According to BLACK'S LAW DICTIONARY, a waiver is the "intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure of forbearance to do which is inconsistent with the right, or his intention to rely upon it." BLACK'S LAW DICTIONARY 1580 (6th ed. 1990). A release is a "writing or an oral statement manifesting an intention to discharge another from an existing or asserted duty." *Id.* at 1289. In Farnsworth's treatise on contracts, a waiver is defined as the "excuse of the nonoccurrence of or delay in the occurrence of a condition of a duty." E.A. FARNSWORTH, CONTRACTS § 8.5 (1982). Farnsworth defines a release as a "formal written statement reciting that the obligor's duty is immediately discharged; although, it has sometimes been used more loosely to refer to any consensual discharge." *Id.* § 4.25.

5. In 1978, President Carter's Reorganization Plan transferred the authority for administering and enforcing the ADEA from the Secretary of Labor to the EEOC. Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321 (1978).

6. Minimum standards for valid unsupervised waivers of ADEA claims are codified by Title II of the OWBPA at 29 U.S.C. § 626(f) (Supp. 1993).

7. Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992).

8. O'Shea v. Commercial Credit Corp., 930 F.2d 358 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 177 (1991).

9. Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991).

The sharp division in a trail of district court opinions manifests the immediate judicial impact of the appellate split.[10] A number of district courts cited the Fourth and Fifth Circuit decisions to hold that retention of severance benefits constituted ratification of waivers to preclude subsequent suits. However, as soon as the Eleventh Circuit announced a contrary decision, district courts began to adhere to the holding that retention of severance benefits did not bar subsequent suits under the ADEA. The Supreme Court has declined to consider the issue in appeals on both sides of the appellate split by denying writ of certiorari from the Fourth Circuit decision in 1991,[11] and from the Eleventh Circuit in 1992.[12] Neither Congress nor the EEOC[13] has yet addressed the issue.

The use of unsupervised waivers may be viewed as mutually beneficial to employers and employees. When Congress amended the ADEA in 1990 with the OWBPA, employers gained a statutory checklist for obtaining enforceable waivers of age discrimination claims from employees. Employers use waivers of claims to achieve settlements in a number of contexts that involve the discharge of employees.[14] An employee may be offered a sum of money or other valuable consideration in exchange for the execution of a waiver that resolves potential claims resulting from a discharge for cause.[15] Employers who need to reduce the size of operations often implement an involuntary reduction in workforce that involves an attempt to mitigate hardship and reduce the risk of

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10. In the following cases, the courts rejected the ratification theory: Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993); Pierce v. Atchison, Topeka and Santa Fe Ry. Co., 1993 WL 18437 (N.D. Ill. Jan. 26, 1993); Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991); Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill. Aug. 26, 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992). In the remaining cases, the courts upheld the ratification theory: Seward v. B.O.C. Division of General Motors Corp., 805 F. Supp. 623 (N.D. Ill. 1992); Frumkin v. International Business Machines Corp., 801 F. Supp. 1029 (S.D.N.Y. 1992); Alphonse v. Northern Telecom, Inc., 776 F. Supp. 1075 (E.D.N.C. 1991); Ponzoni v. Kraft General Foods, Inc., 774 F. Supp. 299 (D.N.J. 1991); Haslach v. Security Pacific Bank Oregon, 779 F. Supp. 489 (D. Or. 1991).

11. O'Shea v. Commercial Credit Corp., 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991).

12. Forbus v. Sears Roebuck & Co., 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992).

13. On March 27, 1992, the EEOC made an appeal to the public for comments regarding the implementation of the OWBPA. 57 Fed. Reg. 10626 (1992). Although the EEOC's request regarded various aspects of OWBPA procedure and enforcement, the issues of ratification or tender back were not directly addressed. The comment period ended on July 27, 1992. *Id.*

14. *See* SENATE COMM. ON LABOR AND HUMAN RESOURCES, THE OLDER WORKERS BENEFIT PROTECTION ACT, S. REP. No. 263, 102d Cong., 2d Sess. 60 (1990).

15. *Id.*

costly litigation by offering enhanced severance benefits in exchange for waivers from employees.[16] In a variation involving the reduction of operations, employers may offer voluntary early retirement incentives in exchange for the execution of waivers.[17] In each scenario, the threshold requirements for an enforceable waiver under the OWBPA likewise benefit employees by ensuring that the employee's decision to execute a waiver is informed, free from coercion, and in exchange for enhanced severance benefits beyond preexisting entitlement.[18]

In light of the advantages that waivers provide to employers and employees, the appellate split could adversely affect significant numbers of workers and their employers in a number of ways by bringing into question the enforceability of such waivers. First, the split provides uncertain precedent for thousands of claims involving waivers filed under the ADEA. Second, employers will lack the assurance that executed waivers will prevent costly litigation because some federal courts have indicated that a timely tender back of benefits might not preclude a subsequent suit.[19] Finally, in the circumstances most egregious to employees, the split provides the incentive for certain employers to circumvent the requirements of the OWBPA through the use of any methods imaginable to induce the execution of waivers.[20] This last problem represents the specific harm that Congress sought to remedy with the OWBPA: "The problem initially addressed . . . [by the OWBPA] . . . involved older workers being coerced or manipulated into waiving their rights under [the ADEA]."[21]

The foregoing problems could cripple the effectiveness of the OWBPA, which potentially affects the rights and claims of the millions of persons at least forty years old who work for employers of more than twenty employees.[22] In 1991, the Bureau of Labor Statistics (BLS) estimated that nearly fifty million workers age forty or older were employed in the United States.[23] Reports from BLS also reveal that between 1987 and 1992, almost four million workers age thirty-five or older with at least

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16. *Id.*

17. *See, e.g.*, Julia Lawlor, *Buyout Game Throws Many, Some Offers Aren't So Voluntary*, USA TODAY, Oct. 29, 1992, at 1B.

18. 29 U.S.C. § 626(f) (Supp. 1993).

19. Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991); Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991).

20. *See, e.g.*, Lawlor, *supra* note 17, at 1B.

21. LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, *supra* note 2, at 1.

22. The OWBPA applies to all employees and employers covered by the ADEA as amended. 29 U.S.C. §§ 630-31 (1988).

23. *See* Randall Samborn, *Age Suits Allowed to Proceed; Keeping Severance OK'd*, NAT'L L.J., Sept. 21, 1992, at 3.

three years' tenure were displaced from their employment, not including those who chose early retirement.[24]

Recent studies of large companies in the United States have shown that the use of unsupervised waivers in corporate downsizing schemes involving early retirement incentives increased significantly during the past decade.[25] For example, the American Management Association recently surveyed 836 members and found that thirty-four percent offered early retirement in 1991 compared to nineteen percent in 1989, while twenty-nine percent offered voluntary severance incentives in 1991 compared to nineteen and a half percent in 1989.[26] Reports also indicate a corresponding increase in the number of employees opting for early retirement.[27] Another survey indicates that sixty percent of employers require employees accepting voluntary retirement programs to execute waivers, which reflects a ten percent increase since 1986.[28] Such statistics illuminate the necessity for timely and permanent resolution of issues arising from the appellate split. Resolution of these issues lies in the restoration of benefits and protections that Congress sought to provide to employers and employees through valid unsupervised waivers under the OWBPA.

This Note offers a model amendment to the ADEA to restore the mandatory statutory protections provided by the OWBPA. The purpose of the amendment is to provide certainty to employers and employees as to what constitutes an enforceable unsupervised waiver. The amendment essentially would codify the holding of the Eleventh Circuit decision in *Forbus v. Sears, Roebuck & Company*[29] by providing a statutory right to challenge the validity of a waiver under the ADEA without the requirement of tender back. Such an amendment ultimately would prevent employers from circumventing the statutory safeguards of the OWBPA, while also providing the certainty to employees signing waivers that a

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24. *Id.*

25. *See, e.g.*, Lawlor, *supra* note 17, at 1B (reviews surveys conducted by the American Management Association and the benefits consulting firm of Wyatt and Drake Beam Morin); *see also* CHIC. TRIB., Apr. 22, 1990, at 12-14B (survey of 145 Fortune 500 companies conducted by Towers, Perrin, Forster & Crosby, Inc. found 44% of the companies offered early retirement packages during a six-year period ending in 1989 with nearly 66% of those early retirement incentives offered in 1988 and 1989).

26. Lawlor, *supra* note 17, at 1B.

27. USA TODAY reported that IBM received 40,000 acceptances of early retirement, although only 20,000 had been expected. At General Motors, 6,300 salaried employees accepted early retirement offers, which was 2,300 more than expected. Kodak had nearly three times the expected number of individuals opting for early retirement with 8,354 acceptances. *Id.*

28. *Id.*

29. Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1041 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992).

violation of their federal statutory rights will not be waived unless by an express agreement in full compliance with the requirements of the OWBPA and the ADEA. The net result should help reduce age discrimination and allow implementation of more efficient and effective severance initiatives by employers.

Part I of this Note discusses the waiver provisions of the OWBPA. Part II outlines and summarizes the case history of the appellate split. Part III contains a proposed model amendment to the ADEA. Finally, Part IV concludes by emphasizing the importance of such an amendment.

I. Title II of the Older Workers Benefit Protection Act

On October 16, 1990, the minimum standards under Title II of the OWBPA became effective regarding waivers of ADEA rights and claims.[30] Title II sets forth mandatory threshold criteria for valid unsupervised waivers of rights and claims under the ADEA, as well as for settlements of actions filed with the courts or with the EEOC. The Act does not apply to waivers that occurred before the effective date.[31]

A. Background on the OWBPA

Prior to the enactment of the OWBPA, the courts conflicted in the application of standards to determine whether a waiver had been executed under circumstances consistent with ADEA purposes and protections.[32] The majority of courts favored application of a "knowing and voluntary" standard, which had been announced by the Supreme Court in a 1974 decision involving a waiver of employment discrimination claims under Title VII of the Civil Rights Act of 1964.[33] An unsupervised waiver was valid if "the employee's consent to the settlement was voluntary and knowing."[34] The criteria required for a waiver to be knowing and voluntary under the ADEA that were set forth in 1988 by the Third

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30. 29 U.S.C. § 626(f) (Supp. 1993). Title I of the OWBPA, which clarifies ADEA coverage of employee benefits as well as wages, hirings and discharge, has a different effective date. *Id.* § 623.

31. *Id.* § 626(f) (Supp. 1993).

32. *See, e.g.*, Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986) (knowing and voluntary standard); Coventry v. United States Steel Corp., 856 F.2d 514 (3d Cir. 1988) (totality of circumstances standard); O'Shea v. Commercial Credit Corp., 734 F. Supp. 218 (D. Md. 1990), *cert. denied*, 112 S. Ct. 177 (1991) (totality of circumstances test and application of ordinary contract principles); EEOC v. Cosmair, Inc. L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987) (waivers of the right to file a charge with the EEOC void as a matter of public policy).

33. Alexander v. Gardner-Denver, 415 U.S. 36, 52 n.15 (1974).

34. *Id.*

Circuit Court of Appeals in *Cirillo v. Arco Chemical Company* [35] provided the model for most of the minimum standards codified later in Title II of the OWBPA. In *Cirillo*, the court determined whether the waiver was knowing and voluntary by considering such factors as the clarity and specificity of the release, the amount of time that the employee was given to consider the agreement, and whether the employee was encouraged to seek the advice of an attorney.[36]

In 1987, the EEOC promulgated a rule that adopted the knowing and voluntary standard for unsupervised waivers of rights and claims under the ADEA.[37] The EEOC justified the regulation by stating that "it has been found necessary and proper and in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval . . . ."[38] In assessing a waiver under the rule, indicia supporting validity based on the knowing and voluntary standard included a written agreement, clear and unambiguous language, specific reference to claims under the ADEA, a reasonable time given to review the agreement, and the opportunity for the employee to consult with an attorney.[39]

After deciding that the EEOC's rule provided an unsatisfactory guide for unsupervised ADEA waivers, Congress immediately suspended funding for its enforcement during fiscal year 1988, and undertook similar measures in 1989 and 1990.[40] The rule was criticized in the Congressional Record as being without legal foundation and contrary to public policy,[41] and strong bipartisan support continued for its suspension. Congress concluded that evidence existed of unfair and abusive practices by employers in obtaining waivers of rights and claims under the ADEA,[42] indicating the need for remedial legislation that would protect older workers more adequately than the EEOC's rule.

Senate Bill 54, the Age Discrimination in Employment Waiver Protection Act of 1989, was introduced in the 101st Congress to allow

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35. Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988).

36. *Id.* at 451.

37. 29 C.F.R. §§ 1627.16 (c)(1)-(3) (1990).

38. *Id.* § (c)(1).

39. *Id.* § (c)(2).

40. Pub. L. No. 100-202, 1987 U.S.C.C.A.N. (101 Stat.) 1329-31; Pub. L. No. 100-459, 1988 U.S.C.C.A.N. (102 Stat.) 2216; Pub. L. No. 101-162, 1990 U.S.C.C.A.N. (103 Stat.) 1020.

41. 134 CONG. REC. S14,509, 14,511 (daily ed. Oct. 4, 1988) (statement of Sen. Metzenbaum).

42. *See* SENATE COMM. ON LABOR AND HUMAN RESOURCES, THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989, S. REP. NO. 79, 101st Cong., 1st Sess. 9-12 (1989); HOUSE COMM. ON EDUCATION AND LABOR, REPORT ON THE OLDER WORKERS BENEFIT PROTECTION ACT (H.R. 3200), H. REP. NO. 664, 101st Cong., 1st Sess. 22-23 (1990).

voluntary and knowing waivers given for valuable consideration, but only in settlement of a bona fide claim alleging age discrimination.[43] The drafters of the original bill specifically sought to prohibit the use of unsupervised waivers in the absence of a bona fide claim.[44] Subsequently, Senate Bill 1511, the Older Workers Benefit Protection Act, was introduced to overturn the Supreme Court's decision in the case of *Public Employees Retirement System of Ohio v. Betts*.[45] The Senate Committee on Labor and Human Resources amended Senate Bill 1511 to create a second title within the Act, which incorporated the basic protections proposed under Senate Bill 54.[46] After substantial compromise[47] and further amendment that included adding provisions to allow unsupervised waivers under the ADEA, Congress approved Senate Bill 1511, and the President signed the OWBPA into law. The final Act reflects the concerns of the EEOC in promoting the voluntary and expeditious private settlement of disputes under the ADEA,[48] a synthesis of case precedent with respect to waivers under the ADEA, and Congressional intent to ensure that older workers are not coerced or manipulated into waiving their statutory protections under the ADEA.

B. Minimum Standards for Unsupervised Waivers Under the OWBPA

Title II of the OWBPA covers the following three types of unsupervised waivers under the ADEA and provides virtually the same minimum standards for each: (1) waivers of individual rights or claims, (2) waivers of rights or claims in connection with group layoffs, reductions in force or exit incentive programs, and (3) waivers in settlement of actions filed in court or claims filed with the EEOC.[49]

Compliance with the minimum standards set forth in the OWBPA constitutes a knowing and voluntary execution of a waiver that may be

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43. S. 54, 101st Cong., 1st Sess. (1989), 135 CONG. REC. S357 (daily ed. Jan. 25, 1989). Under S. 54, a bona fide claim was defined as a charge filed with the EEOC, an action filed by an individual in a court alleging age discrimination, or a specific communication to the employer by the employee in writing and in good faith. *Id.*

44. THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989 (Report of the Senate Committee on Labor and Human Resources), *supra* note 42, at 3.

45. 492 U.S. 158 (1989), *cert. denied*, 498 U.S. 963 (1990). *See supra* note 1.

46. LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, *supra* note 2, at 1.

47. *See* 136 CONG. REC. S13,594, 13,596 (daily ed. Sept. 24, 1990) (statement of Sen. Metzenbaum).

48. *See* Draft EEOC Rules Outline Support for Private Waivers Under Age Bias Act, *reprinted in* DAILY LAB. REP. (BNA) No. 141, at A-6, A-7 (July 23, 1985).

49. 29 U.S.C. § 626(f)(1)-(2) (Supp. 1993).

enforced by the courts.[50] A waiver of individual rights or claims under the ADEA must meet the following criteria prescribed in the OWBPA: (1) the waiver must be part of a written agreement in language calculated to be understood by the person who is waiving rights or claims, or by the average individual eligible to participate; (2) the waiver must refer specifically to rights and claims under the ADEA; (3) the individual cannot prospectively waive rights that arise after the execution of the waiver; (4) the waiver must be in exchange for something of value in addition to whatever the individual is already entitled to receive; (5) the individual must be advised in writing to consult with an attorney prior to executing the waiver; (6) the individual must be given at least twenty-one days to consider the agreement; and (7) the employee must be given at least seven days following execution to revoke the waiver. If the employer complies with all of the requirements above, the waiver will become effective after the revocation period expires.[51]

The minimum standards for waivers of rights or claims in connection with group layoffs, reductions in force, or exit incentive programs may be considered by an individual in the group for forty-five days.[52] Such waivers must otherwise comply with the requirements for a waiver by an individual. Waivers for groups must also disclose the job titles and ages of all individuals who are eligible to participate, and of those who are not eligible.[53]

The last type of waiver covered by the Act involves the settlement of a charge filed with the EEOC or an action filed in a court by an individual alleging age discrimination. All of the minimum standards that apply to individual and group waivers apply to waivers in settlement of a charge or action, except for the provision of a revocation period and the requirement of either a twenty-one or forty-five day period of time within which to consider the waiver.[54] Instead, an individual must be given "a reasonable period of time within which to consider the settlement agreement."[55] The lack of a specific time period reflects a consideration by Congress, which was fundamental to waivers of bona fide claims under the precursor to Title II, Senate Bill 54, that an individual who has taken the formal adversarial steps of filing a claim or charge is more likely to be aware of rights under the ADEA before waiving them.[56] Therefore, Congress did not provide a specific period

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50. *Id.* § (f)(1).
51. *Id.* § (f)(1)(A)-(G).
52. *Id.* § (f)(1)(F)(ii).
53. *Id.* § (f)(1)(H)(i)-(ii).
54. *Id.* § (f)(2)(A).
55. *Id.* § (f)(2)(B).
56. 135 CONG. REC. E1131 (daily ed. Apr. 10, 1989) (statement of Rep. Roybal)

of time for individuals to consider waivers in settlement of claims or charges.

The waiver provisions of the OWBPA are more protective of older workers than the EEOC's 1987 rule. For example, the EEOC's rule did not provide an individual the power to revoke the waiver,[57] but the OWBPA allows an individual to revoke the waiver during a period of at least seven days following execution.[58] The OWBPA reverses the burden of proof, which was imposed on the employee under the EEOC's rule, by requiring that the party asserting the validity of a waiver has the burden of proving that the waiver satisfies the minimum standards imposed by the Act.[59] Ultimately, the OWBPA permanently nullifies the EEOC's rule on ADEA waivers.[60]

C. Mandatory Nature of the Minimum Standards of Title II

Ample authority exists that supports the mandatory nature of the minimum standards for a valid unsupervised waiver under Title II of the OWBPA. First, the Act provides in unambiguous language that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary."[61] Under the Act, a waiver is not knowing and voluntary unless at a minimum it meets *all* of the applicable enumerated standards, depending on the type of waiver.[62] Congress neither contemplated nor provided any other method by which to waive rights and claims under the ADEA. The canons of statutory construction mandate that courts apply first the plain meaning of the statute. In the absence of Congressional intent to the contrary, the plain meaning of a statute provides controlling law.[63] Hence, the minimum standards of Title II must be applied by the courts to determine whether an individual has executed a valid waiver of rights and claims under the ADEA. If an employer has not complied with the minimum standards of Title II, the waiver is invalid and unenforceable.

Under Title II, the provision that allocates the burden of proof to the party asserting the validity of the waiver states: "In *any* dispute that may arise over whether *any* of the requirements, conditions, and

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("It is in the nonadversarial situation, such as the use of waivers in conjunction with early retirement incentives, that the possibility of employer abuse of waivers increases.").

57. 29 C.F.R. § 1627.16(c) (1990).

58. 29 U.S.C. § 626(f)(1)(G) (Supp. 1993).

59. *Id.* § (f)(3).

60. *Id.* § (f).

61. *Id.* § (f)(1).

62. *Id.*

63. *See, e.g.*, North Dakota v. United States, 460 U.S. 300 (1983); American Tobacco Co. v. Patterson, 456 U.S. 63 (1982).

circumstances set forth [in Title II] have been met, the party asserting the validity of a waiver shall have the burden of proving *in a court of competent jurisdiction* that a waiver was knowing and voluntary . . . ."[64] The language of the provision indicates that all of the minimum standards under Title II are mandatory, and that adjudication by the courts is unconditionally available if a dispute arises over any single standard.

Second, the language of the ADEA provides support that the minimum standards for waivers under Title II are mandatory. The ADEA as amended is unique among federal statutes in light of its legislative history of congressional concern about the misuse of waivers.[65] Although the ADEA encouraged voluntary settlement of claims alleging age discrimination before the OWBPA, the ADEA did not do so by allowing employers to obtain allegedly invalid waivers. Rather, the ADEA states that voluntary settlement shall be "in compliance with the requirements of the Act."[66] A specific mechanism of the ADEA involving conciliation before suit through the EEOC enables the potential parties to explore a voluntary settlement of age discrimination claims.[67] When Congress amended the ADEA with the OWBPA, the requirements of Title II became the requirements of the ADEA. Congress did not alter the provisions in the ADEA regarding compliance with the Act in voluntary settlements or the conciliation options through the EEOC. Courts have continued to interpret the ADEA in accordance with these provisions.[68] The Supreme Court has held that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[69] Therefore, a voluntary settlement of claims or rights under the ADEA must comply with the minimum standards of Title II.

Third, the legislative history of Title II reveals further evidence of the mandatory nature of minimum standards for unsupervised waivers under the ADEA in the differences between EEOC's rule of 1987, which Congress suspended and later nullified, and Title II as law. Under the

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64. 29 U.S.C. § 626 (f)(3) (Supp. 1993) (emphasis added).

65. *See generally* LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, *supra* note 2.

66. 29 U.S.C. § 626(b) (1988).

67. Section 626(b) of the ADEA provides in part that "the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion." *Id.*

68. Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1041 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992); Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991); Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993).

69. Lorillard v. Pons, 434 U.S. 575, 580 (1978) (holding that Congress intended individual plaintiffs to have the right to a trial by jury under the ADEA).

EEOC's rule, certain factors were identified as relevant to determining whether a waiver was knowing and voluntary, but the only mandatory requirement was that the waiver be in writing. Title II includes some of the standards under the EEOC rule, but the requirement that a knowing and voluntary waiver must meet all of the minimum standards unambiguously forwards a congressional intent that Title II itself is not merely relevant to waivers under the ADEA, but mandatory.

Fourth, Congress substantially incorporated the enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA)[70] into the ADEA.[71] The enforcement provisions of the FLSA have been upheld repeatedly by the Supreme Court as mandatory.[72] Moreover, the Supreme Court has held that the enforcement provisions of the FLSA should be followed in interpreting the ADEA.[73] Waivers under Title II deal purely with enforcement of the substantive prohibitions of age discrimination under the ADEA. Hence, case precedent by the Supreme Court provides authority that minimum standards for waivers under Title II should be upheld as mandatory.

In sum, the plain and strict requirements in Title II of the OWBPA provide mandatory minimum standards for unsupervised waivers of rights and claims under the ADEA. The legislative history of Title II reflects the strong congressional intent to ensure that older workers are not coerced or manipulated into waiving their statutory protections under the ADEA. While the OWBPA provides a statutory means for waiving rights and claims under the ADEA, the only way to obtain such a valid waiver is through full compliance with Title II. In other words, although rights and claims arising from the substantive provisions of the ADEA may be waived, the procedure for obtaining a valid waiver under Title II may not be waived. A waiver of the requirements of Title II would be void as against public policy, as would a waiver of any other mandatory federal requirement. The express mandates of Title II and the clear Congressional intent of the OWBPA provide the law controlling the issues of whether retention of severance benefits constitutes ratification of an ADEA waiver unless the individual tenders back the benefits to the employer, or whether retention categorically precludes a subsequent suit.

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70. 29 U.S.C. §§ 201-219 (1988).

71. 29 U.S.C. § 626 (1988). *See* THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989 (Report of the Senate Committee on Labor and Human Resources), *supra* note 42, at 3.

72. *See* Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Schulte Co. v. Gangi, 328 U.S. 108 (1946); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981).

73. Lorillard v. Pons, 434 U.S. 575, 580 (1978).

II. History of the Appellate Split

On April 20, 1992, the Eleventh Circuit Court of Appeals held in *Forbus v. Sears Roebuck & Co.*, that "as a matter of federal law, ADEA plaintiffs are not required to tender the consideration received for releases as a condition prerequisite to challenging those releases in court, and that the . . . retention of . . . severance benefits during the pendency of [a] lawsuit does not constitute ratification of those releases."[74] The holding of the Eleventh Circuit in *Forbus* contradicted previous holdings of the Fourth and Fifth Circuits that even if the waiver "was invalid,"[75] or "tainted by misrepresentation,"[76] the individual alleging age discrimination ratified the otherwise voidable waiver under the ordinary contract principles of the common law through retention of severance benefits. The holdings of Courts of Appeals involved in the split of authority have been frequently cited by the federal district courts, producing two distinct trails of opinions regarding the issue of waivers.[77]

A. Ratification of a Waiver by Retention of Benefits: Grillet *and* O'Shea

In *Grillet v. Sears, Roebuck & Co.*,[78] the Fifth Circuit Court of Appeals addressed the issues of ratification and tender with regard to a waiver of rights under the ADEA. At sixty years of age, the plaintiff in *Grillet* had spent twenty-six years as a personnel representative for a company when she was informed by her supervisor that her position would be terminated in three days as part of a restructuring plan.[79] The supervisor explained that the plaintiff could either accept ten weeks' severance pay in the amount of $9,000 if she did not sign a waiver of claims against the company, or fifty weeks' severance pay in the amount of $45,000 if she executed the waiver.[80] The supervisor presented the plaintiff with two different waiver forms, one indicating that the employee

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74. Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1041 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992).

75. O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991).

76. Grillet v. Sears, Roebuck & Co., 927 F.2d 217, 221 (5th Cir. 1991).

77. *See, e.g.*, Seward v. B.O.C. Division of General Motors Corp., 805 F. Supp. 623 (N.D. Ill. 1992) (holding that ratification precludes subsequent challenge of an ADEA waiver); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill, Aug. 26, 1992) (holding that retention of severance benefits did not preclude subsequent challenge of an ADEA waiver).

78. 927 F.2d 217 (5th Cir. 1991).

79. *Id.* at 218.

80. *Id.*

declined the opportunity to consult with an attorney, and the other indicating that the employee had obtained legal advice.[81] The plaintiff chose to sign the waiver without the advice of an attorney, and $45,000 was paid to her over the next several months.[82]

A week after the plaintiff executed the waiver, she learned that the company had offered new job assignments to three younger employees in her department.[83] Nineteen months after her termination, the plaintiff filed an action under the ADEA and for various state claims involving age discrimination, misrepresentation and duress.[84] The company counterclaimed for breach of contract, alleging that the plaintiff's suit constituted a breach of the waiver agreement.[85] After the company moved for summary judgment, the plaintiff offered to tender back the enhanced severance pay with interest on the condition that she receive a reinstatement to her former position and back pay, but this offer was rejected by the company.[86] The district court denied the company's motion for summary judgment based on the finding that material issues of fact remained as to whether the plaintiff had knowingly and voluntarily executed the waiver.[87] The company moved for reconsideration, asserting that the plaintiff had ratified the waiver by accepting the severance payments.[88] Upon denial of the company's second motion, the Fifth Circuit accepted the appeal under the collateral order doctrine.[89]

The Fifth Circuit held that the company should have been granted summary judgment.[90] The court incorporated into its holding the company's theory that even if the waiver was tainted by misrepresentation and duress, and thus the execution was not knowing and voluntary, the plaintiff ratified the waiver by accepting the severance benefits after learning of the misrepresentation:[91] "If a releasor . . . retains the consideration after learning that the release is voidable, her continued retention of the benefits constitutes a ratification of the release."[92]

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81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 219. The collateral order doctrine provides appellate jurisdiction to review a non-final order by a district court that "(1) conclusively determines the disputed question; (2) resolves an important issue separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment." *Id.*
90. *Id.* at 221.
91. *Id.* at 220-21.
92. *Id.* at 220.

Although the effective date of the OWBPA made the Act's minimum standards inapplicable to the plaintiff's waiver, the court did not consider congressional intent underlying the ADEA, nor the weight of the federal common law of waivers under the ADEA. Instead, the Fifth Circuit relied on a district court opinion that had found employees' general waivers of employment discrimination claims enforceable based on the theory that retention of the benefits ratified the waivers.[93] The court also incorporated the holdings of various federal decisions applying the common law of contracts to hold as follows:

> Even if Grillet's tender-back offer had been sufficient, it came too late. The law of contracts "requires a party claiming wrongful inducement to seek rescission shortly after discovering the misrepresentation." . . . To avoid ratifying the release through her conduct, Grillet should have returned the consideration soon after she learned that some younger employees in her department had not been terminated.[94]

The court also reasoned that because "[a] party seeking rescission must attempt to restore the status quo ante — that is, to return the parties to the positions they held just before they entered into the agreement,"[95] the employer could not be returned to its position after being subjected to a lawsuit for age discrimination when the employee could have been terminated previously at the will of the employer.[96] Thus, the *Grillet* decision stands for the proposition that retention of benefits received from executing a voidable unsupervised waiver constitutes ratification of the waiver, unless an individual tenders back the benefits in an effort to return to the status quo soon after learning the waiver is voidable.

Three weeks after the Fifth Circuit decided *Grillet*, the Fourth Circuit independently upheld an arguably stricter application of the ratification theory in *O'Shea v. Commercial Credit Corporation*.[97] In *O'Shea*, the

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93. *Id.* (citing Widener v. Arco Oil and Gas Co., 717 F. Supp. 1211 (N.D. Tex. 1989)).

94. *Id.* at 221 (quoting United States v. Texarkana Trawlers, 846 F.2d 297, 305 n.20 (5th Cir.) (1988), *cert. denied*, 488 U.S. 943 (1988) citing Anselmo v. Manufacturers Life Ins. Co., 771 F.2d 417 (8th Cir. 1985)). In *Anselmo*, the Eighth Circuit Court of Appeals held that the silence, acquiescence, and according conduct by the plaintiff for a considerable time following execution of a waiver and acceptance of severance pay benefits amounted to a ratification that precluded subsequent state law claims for breach of contract and fraudulent misrepresentation. *Anselmo*, 771 F.2d at 417.

95. *Grillet*, 927 F.2d at 220 (citing United States v. Texarkana Trawlers, 846 F.2d 297, 304 (5th Cir. 1988)), *cert. denied*, 488 U.S. 943 (1988)).

96. *Grillet*, 927 F.2d at 221.

97. 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991).

defendant was an employer that terminated the position the plaintiff had held for twenty-seven years. The plaintiff's supervisor offered a waiver of any claims against the employer in exchange for enhanced severance benefits, which included twenty-seven weeks' severance pay and a determination that she was to be considered on unpaid leave of absence for some months in order to "bridge" her early retirement to age fifty-five. The waiver contained a clause stating that execution must occur within five days, or else the plaintiff's benefits would be lost. Although the plaintiff consulted with two attorneys, neither was able to advise her as to the validity of the waiver. The plaintiff could not afford to lose the benefits set forth in the waiver, so she executed the waiver. The plaintiff claimed to have learned subsequently that her employer had taken out advertisements and had hired new employees in her department. However, the plaintiff also admitted in a letter to her Senator that she "'purposely avoided [filing an] age discrimination action,'" until all of her deferred severance had been paid.[98]

On appeal, the Fourth Circuit affirmed the district court's grant of summary judgment for the employer upon three apparent grounds.[99] First, after reviewing the pre-OWBPA standards for determining the validity of an ADEA waiver, the court held that "the better approach is to analyze waivers of ADEA claims under ordinary contract principles . . . . Accordingly, we turn to the appropriate state's law for guidance. . . ."[100] Applying state contract law, the court held that setting aside a waiver could only be done for the same reasons that allow a party to "void a contract."[101] However, the court's second ground for upholding the validity of the waiver was based essentially on an ADEA knowing and voluntary standard: "O'Shea's decision to execute the agreement was voluntary, deliberate, and informed."[102] The court found no evidence of fraud or economic duress that would allow the plaintiff to void the waiver, and because "[i]t is a well-established proposition that the retention of benefits of a voidable contract may constitute ratification, ... O'Shea validly released her ADEA rights under both federal and state law."[103] The court emphasized a distinction between voidable waivers that were induced by duress and subject to ratification absent a tender back of consideration, and void waivers that would be unaffected by a ratification theory.[104] In the alternative, the court's third

98. *Id.* at 361.
99. *Id.* at 361-62.
100. *Id.* at 362.
101. *Id.*
102. *Id.*
103. *Id.* at 362-63.
104. *Id.* at 362.

ground held that "even if the release executed by the appellant was invalid, the [employer] would have prevailed on the ground that the [individual's] subsequent acceptance of the severance pay demonstrated an intent to ratify the agreement."[105]

The *O'Shea* court also cited an Eighth Circuit case relied upon in *Grillet* that discussed the effects of a timely tender back of consideration received from a waiver, leaving open the possibility that prompt repudiation of the waiver might have preserved the plaintiff's age discrimination claims.[106] The court implied that if the parties could have been returned to the status quo existing before execution of the waiver, the plaintiff might not have been precluded from bringing her age discrimination lawsuit: "Clearly, O'Shea sought to have it both ways, and that is something which the doctrine of ratification was designed not to permit."[107] The court concluded the opinion by upholding the facial validity of the waiver, and in the alternative, the subsequent ratification of the waiver based upon the three asserted grounds.[108]

B. Impact and Post-OWBPA Implications of Ratification in Grillet *and* O'Shea

The appellate decisions of *Grillet* and *O'Shea* have been cited by a number of district courts holding that the failure to tender back severance benefits received in exchange for execution of a waiver constitutes ratification.[109] One general inquiry that these courts have borrowed from *Grillet* and *O'Shea* to decide whether an individual has ratified a waiver involves evaluating the conduct of the individual after execution with respect to the consideration from the agreement.[110] Although some courts have been willing to uphold ratification based upon the retention of a lump sum of benefits for a period of time, other courts have made the distinction that only conduct involving the continuous receipt of benefits over a period of time demonstrates an intent by the individual to ratify

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105. *Id.*

106. *Id.* at 362. (citing Anselmo v. Manufacturers Life Ins. Co., 771 F.2d 417 (8th Cir. 1985)).

107. *Id.* at 363.

108. *Id.* at 362.

109. Seward v. B.O.C. Division of General Motors Corp., 805 F. Supp. 623 (N.D. Ill. 1992); Alphonse v. Northern Telecom, Inc., 776 F. Supp. 1075 (E.D. N.C. 1991); Ponzoni v. Kraft General Foods, Inc., 774 F. Supp. 299 (D. N.J. 1991); Haslach v. Security Pacific Bank Oregon, 779 F. Supp. 489 (D. Or. 1991); Frumkin v. International Business Machines Corp., 801 F. Supp. 1029 (S.D.N.Y. 1992).

110. *See, e.g.,* Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991) (continued acceptance of benefits by ex-employee after learning of alleged misrepresentation constituted ratification).

the agreement.[111] Generally, the courts adopting ratification theories have not scrutinized the soundness of applying state contract law with respect to the enactment of the OWBPA and other actions by Congress expressing concern over ADEA waivers. However, several district courts have either expressly rejected the ratification holding in *Grillet* and *O'Shea* or chosen not to follow the appellate holdings by distinguishing the facts from the instant case.[112]

In *Grillet*, *O'Shea*, and their progeny at the district court level, the courts have addressed issues involving waivers that predate the mandatory minimum standards of the OWBPA. The suspension of the EEOC's rule by Congress, the legislative history of Title II, and the enactment of the OWBPA, did not convince courts upholding ratification of ADEA waivers to provide special scrutiny to such agreements based upon the express congressional intent: "Put simply, [the plaintiff] is inviting this court to accord special significance to acts of Congress which have done no more than leave the law in its nascent state on the issue of unsupervised waivers. We decline that invitation."[113] Instead, the courts upheld a ratification theory that assumed the waiver had not been executed in accordance with a pre-OWBPA standard of knowing and voluntary agreement and consequently treated the waiver as a voidable contract subject either to absolute ratification upon acceptance of consideration, or to rescission upon a timely tender back of the consideration. Moreover, these courts have drawn a distinction between void and voidable contracts, claiming that waivers under the ADEA are voidable, not void, for a period of time following execution.

In light of the mandatory nature of minimum standards under Title II, courts that have previously upheld the ratification theory should defer to the OWBPA as controlling law for waivers executed after the effective date of the Act. However, it is unclear whether these courts will adhere to the mandates of the Act. Neither the decision in *Grillet* nor *O'Shea* addresses the intended impact of the holding upon post-OWBPA cases involving waivers that do not comply with Title II of the OWBPA. In

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111. *See, e.g.*, Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991) (retaining a lump sum severance payment, as opposed to continuous receipt of payments, did not constitute ratification).

112. Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993) (rejecting *Grillet* and *O'Shea*); Pierce v. Atchison, Topeka and Santa Fe Ry. Co., 1993 WL 18437 (N.D. Ill. Jan. 26, 1993) (distinguishing the facts of the case from *Grillet* and *O'Shea*); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill Aug. 26, 1992) (rejecting *Grillet* and *O'Shea*); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992) (rejecting *Grillet*); Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991) (distinguishing the facts of the case from *Grillet*); Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991) (rejecting *Grillet* and *O'Shea*).

113. *O'Shea*, 930 F.2d at 361.

the first cases to present district courts with the issue of the validity of waivers executed since the OWBPA became effective, employers have asserted unsuccessful defenses that rely primarily upon *Grillet* and *O'Shea*.[114] Moreover, a recent appellate decision cited *O'Shea*, not for the ratification holding, but for the basic proposition that employees may validly waive ADEA rights and claims in private settlements.[115] The court remanded the case for a determination of the validity of the waiver based upon knowing and voluntary execution.[116] The clear impact of a possible continued adherence by the courts to variations of a ratification theory as applied to waivers covered by the effective date of Title II would render the express provisions of the Act ineffective and thwart the congressional purposes in cases involving waivers not complying with the minimum statutory requirements.

C. *Retention of Benefits Without Effect on Claims Under the ADEA:* Isaacs *and* Forbus

The decisions of *Grillet* and *O'Shea* were a few weeks old when a district court issued a contrary holding regarding the issues of ratification and tender back as a condition precedent to bringing a subsequent action.[117] Although the case of *Isaacs v. Caterpillar, Inc.* does not stand on equal authoritative ground with the appellate decisions by the Fourth and Fifth Circuits, the rationale and holding were adopted expressly in the decision of the Eleventh Circuit that officially created the appellate split.[118] Furthermore, *Isaacs* provides an extensive in-depth discussion of the tender and ratification issues, compared to the relatively brief treatment given by the appellate decisions in *Grillet* and *O'Shea*.

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114. Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993); Pierce v. Atchison, Topeka and Santa Fe Ry. Co., 1993 WL 18437 (N.D. Ill. Jan. 26, 1993); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill Aug. 26, 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992).

115. Gormin v. Brown-Forman Corp., 963 F.2d 323 (11th Cir. 1992).

116. *Id.* at 327.

117. Isaacs v. Caterpillar, Inc., 765 F. Supp. 1359 (C.D. Ill. 1991). *Isaacs* was decided on May 23, 1991, *O'Shea*, 930 F.2d at 358, on April 11, 1991, and *Grillet*, 927 F.2d at 217, on March 26, 1991.

118. Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992): "We agree with, and find persuasive, the reasoning set forth in *Isaacs* that explains public policy considerations supporting our determination that the Retirees should not be required to tender their retirement benefits back to Sears as a prerequisite to the maintenance of their lawsuit." *Id.* at 1040. The reasoning set forth in *Isaacs* that the court in *Forbus* relied upon also included a discussion of *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968), a Supreme Court decision that rejected a tender back requirement of a plaintiff under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988). *See infra* text accompanying notes 127-49.

In *Isaacs*, the plaintiffs alleged a pattern or practice by their employer of coercing older employees into retirement or separation from employment because of their age.[119] The waivers at issue stated that the employer was released from claims relating to retirement from employment in exchange for severance payments and benefits beyond the plaintiffs' entitlement under the normal retirement plan.[120] The plaintiffs alleged that the waivers were invalid under the ADEA because they were not given on a knowing and voluntary basis.[121] None of the plaintiffs offered to return the benefits they received in exchange for executing the waivers.[122] The employer moved for summary judgment, contending that the plaintiffs were required to tender back the benefits as a condition precedent to bringing an action.[123] The employer further argued that the plaintiffs had ratified the waivers by retaining the benefits during the three years of litigation involved in the action, thereby precluding subsequent challenges on the issue of validity.[124] The court adopted the employer's assertion that the court could assume the waivers "were entered into either as a result of duress, fraud, or mistake because the Plaintiffs did not know what they were signing."'[125] The employer based its sole argument for summary judgment upon the "tender/ratification argument,"[126] relying on the holdings of *Grillet* and *O'Shea* without addressing the merits of the plaintiff's claims.

The district court chose not to follow *Grillet* and *O'Shea*, but relied instead on a 1968 decision by the Supreme Court in *Hogue v. Southern Railroad Co.* [127] as the most persuasive law relating to the waivers.[128] The *Hogue* decision involved an employee's lawsuit under the Federal Employer's Liability Act (FELA). The court recognized that other cases deciding the tender/ratification issue of ADEA waivers had not previously cited the Supreme Court decision.[129] However, the *Isaacs* court found the decision highly instructive, stating "[u]nder *Hogue*, whether a tender requirement exists is not to be decided by state contract law doctrines.

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119. *Isaacs*, 765 F. Supp. at 1362.

120. *Id.* at 1363-64.

121. *Id.* at 1364.

122. *Id.*

123. *Id.* at 1363.

124. *Id.* at 1364.

125. *Id.* at 1365 (citing the court's transcript of the proceedings of May 3, 1991 relating to the motion for summary judgment made by the employer).

126. *Id.* at 1363.

127. *Hogue*, 390 U.S. 516 (1968).

128. *Isaacs*, 765 F.Supp at 1366.

129. *Id.* The *Hogue* decision had gone unnoticed during the rise of the federal judge-made law with respect to ADEA waivers. *See, e.g.*, Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988).

It is a federal question, and must be decided by considering whether such a requirement would be 'incongruous with the general policy' of the statute in question."[130] The *Isaacs* court noted that because the FELA and the ADEA are remedial statutes intended to protect employees, "[n]o apparent reason exists not to apply *Hogue* to the ADEA."[131]

The *Isaacs* court applied the *Hogue* decision to the employees' waivers in holding that (1) "as a matter of federal law, there is no requirement that ADEA plaintiffs tender the consideration received for releases as a condition of challenging those releases in a lawsuit," and (2) "[f]or the same reasons, the retention by Plaintiffs of benefits they received under the [releases] during the pendency of this lawsuit does not constitute 'ratification' of those releases."[132] The grounds offered by the *Isaacs* court included following the precedent of the Supreme Court decision in *Hogue* over the appellate decisions in *Grillet* and *O'Shea*,[133] citing the purposes and provisions of the ADEA as amended, and propounding in the alternative an analysis of contract law that would allow the retirees to maintain their ADEA suits without ratification or a tender back of consideration from the waivers.[134]

The court's analogous use of *Hogue* involved a detailed review of the Supreme Court decision.[135] In *Hogue*, an injured railroad employee signed a release in exchange for a sum of money.[136] The employee later sued, alleging that the release was void for mutual mistake of fact.[137] He did not later tender back the consideration that he had been paid for the executing the release.[138] The state courts held that under state common law, failure to tender back consideration constituted ratification, requiring the suit to be dismissed.[139] The Supreme Court reversed on two fundamental grounds. First, "[t]he question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law."[140] Second, the Court held that a tender back prerequisite would be "'wholly incongruous with

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130. *Isaacs*, 765 F. Supp. at 1366.
131. *Id.* at 1367.
132. *Id.* at 1371.
133. *Id.* at 1369. The opinion states that "while this Court has the greatest respect for the Fourth and Fifth Circuits, it must follow the law as laid down by the Supreme Court in *Hogue*, and must apply the law to the ADEA unless some tenable reason exists not to do so." *Id.*
134. *Id.*
135. *Id.* at 1366.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* (citing *Hogue*, 390 U.S. at 517).

the general policy of [the FELA] to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers,'"[141] and that the original consideration paid to the employee "[should] be deducted from any award determined to be due . . . ."[142] The *Isaacs* court cited lower courts' application of *Hogue* to reject tender requirements in lawsuits under other federal remedial statutes and noted that the Supreme Court's decision was neither discussed nor mentioned in either *Grillet* or *O'Shea*.[143] Thus, *Hogue* provided the highest authority for the holdings of *Isaacs*.

The *Isaacs* court's policy grounds included "four special factors associated with the ADEA [that] make it particularly necessary to apply the rule of *Hogue* to ADEA suits."[144] First, the court found that "a tender requirement would deter meritorious challenges to releases" in ADEA lawsuits, particularly in the context of early retirement programs.[145] As a practical matter, the court noted the unlikeliness that retired employees would be able to save their severance payments "to be able to come up with the money to make such a tender at such later time as they acquire grounds to believe that a successful lawsuit might be mounted in connection with their retirements."[146] Second, the court recognized the "continuing [congressional] preoccupation with ADEA releases," including suspension of the EEOC's rule and passage of the OWBPA, "which severely restricts the use of releases" with minimum standards.[147] The court found the congressional history relevant to the tender issue, "because *Hogue* instructs federal courts to consider whether a tender requirement would interfere with the remedial purposes of the statute."[148] A tender requirement would run afoul of congressional intent by making it "impossible for most employees to challenge ADEA releases."[149] Third, the court noted that a tender requirement would allow employers to circumvent the waiver provisions of the OWBPA: "No matter how egregiously releases might violate the requirements of the Older Workers Benefit Protection Act, employees would be precluded

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141. *Isaacs*, 765 F. Supp at 1366 (citing *Hogue*, 390 U.S. at 518 (citing Dice v. Akron, C. & Y. R. Co., 342 U.S. 359 (1952))).

142. *Isaacs*, 765 F. Supp at 1366 (citing *Hogue*, 390 U.S. at 518).

143. The *Isaacs* court cited Smith v. Pinell, 597 F.2d 994, 996 (5th Cir. 1979) (Jones Act); Wahsner v. American Motors Sales Corp., 597 F. Supp. 991, 998 (E.D. Pa. 1984) (Automobile Dealers' Day in Court Act); Taxin v. Food Fair Stores, Inc., 197 F. Supp. 827, 830-31 (E.D. Pa. 1961) (Sherman Antitrust Act).

144. *Isaacs*, 765 F. Supp. at 1367.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

from challenging them unless they somehow could come up with the money they were given when allegedly forced into retirement."[150]

The fourth factor constituted an overt attack on the assumption made in the rationales of *Grillet* and *O'Shea* that the tender back of consideration justified rescission by restoring the parties to the condition existing before the employee executed the release.[151] The *Isaacs* court stated that "[i]mposing a 'tender' requirement for challenges to ADEA releases would frequently create insoluble practical problems."[152] The court reasoned that although a tender back of consideration from a waiver settling a personal injury claim might be fairly assumed to restore the parties to their pre-waiver condition, the use of consideration in an ADEA waiver frequently involves the inducement of an early retirement program, not merely a waiver of age discrimination claims:

> The purpose of such programs is to induce people to retire earlier than they otherwise would have done. Such early retirement is an economic benefit to the company. To get it, the company offers the employee money for leaving early. If the company has plaintiffs sign a release in connection with these incentive retirement payments, the *status quo* is *not* restored if the employee tenders the consideration received in connection with his retirement and the employer accepts it and rescinds the release. To the contrary, such an exchange would arguably unjustly enrich the employer. The employee is deprived of money paid to induce him to retire, yet he or she is not restored to employment; all he or she gets is the rescission of his or her release.[153]

Thus, the insoluble practical problem that would develop from a tender requirement in ADEA cases involves the "conundrum as to how much should be tendered to restore the pre-release *status quo*."[154] The court pointed to the lack of a method that would force the parties to agree as to the appropriate amount to be tendered back, especially given that

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150. *Id.*

151. *See supra* text accompanying notes 95 and 107.

152. *Isaacs*, 765 F. Supp. at 1367.

153. *Id.* Although the language of the court suggests the possibility of an express promise not to file a lawsuit under the ADEA in a waiver, the validity and scope of such a waiver would be highly suspect under Title II of the OWBPA. Title II expressly prohibits prospective waiver of rights and claims arising after the date the waiver is executed. 29 U.S.C. § 626(f)(1)(C) (Supp. 1993). Analogous to the prohibition of prospective waiver under the Title of the OWBPA, the Supreme Court has held that with respect to employment discrimination claims under the Civil Rights Act, "[t]here can be no prospective waiver of an employee's rights under Title VII." Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

154. *Isaacs*, 765 F. Supp at 1368.

employers do not typically specify how much consideration is in exchange for retirement and how much is in exchange for a release of claims.[155]

In *Isaacs*, the employer made numerous assertions in favor of a tender requirement as a condition precedent to bringing an action.[156] In response to the assertion by the plaintiffs that a tender requirement would largely nullify the effectiveness of the OWBPA, the employer argued that the OWBPA could not be retroactively applied to the employees' waivers to preclude a tender requirement.[157] The court rejected the employer's argument based on the lack of precedent in the courts, or in the legislative history, supporting a tender requirement:

> Neither the text nor the legislative history of the OWBPA says anything about tenders as a condition of challenging releases. The law of tender, therefore, is presumably the same after the OWBPA as it was before it. If there was a tender requirement before the OWBPA, then there still is one; if there was not, then there still is not. This point weighs heavily against the existence of a judge-made tender requirement under the ADEA, because such a judge-made requirement would eliminate the ability of most employees to challenge releases obtained in violation of the OWBPA.[158]

The employer asserted further that the consideration paid to the employees for the waivers was for the right to be free from a lawsuit, and the present action deprived the employer of the benefit of its bargain.[159] The court also rejected this assertion, stating that unless a waiver is "explicitly worded as a promise not to file a lawsuit," a waiver is "merely a potential defense to a lawsuit once filed."[160] In a general response to several other assertions by the employer criticizing the applicability of the *Hogue* decision because the ADEA "encourages voluntary settlement,"[161] disputing the potential deterrent effect of a tender requirement, and denying the difficulty in determining the amount of consideration to tender in order to return the status quo, the court concluded that a tender requirement could not be applied to the EEOC's right to enforce the ADEA without violating congressional purposes, and therefore it would be an inconsistent application to actions filed by individuals.[162]

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155. *Id.*
156. *Id.* at 1368-71.
157. *Id.* at 1369.
158. *Id.*
159. *Id.* at 1370.
160. *Id.* at 1370-71.
161. *Id.* at 1368.
162. *Id.* at 1370-71.

A final alternative ground offered by the court in *Isaacs* involved a rejection of the interpretations of contract law made in *Grillet* and *O'Shea*: "*Grillet* and *O'Shea* assume that it is a universally accepted rule of state contract law that a person who has signed a release must tender the consideration to a defendant prior to suing to void the release. There is no such unanimity."[163] In support, the court cited a number of state cases that had either expressly abandoned a tender requirement or refused to adopt one.[164] The court also cited section 480 of the American Law Institute Restatement of Contracts, which does not require a tender back of consideration "where the consideration for the release 'is merely money paid, the amount of which can be credited in partial cancellation of the injured party's claim.'"[165] Moreover, the court found relevant section 384(1)(b) of the Second Restatement of Contracts, "which excuses a tender of the consideration where the 'court can assure such return [of the consideration] in connection with the relief granted.'"[166] Neither *Grillet* nor *O'Shea* mentioned the Restatement sections relied upon by the court, and the court concluded a discussion of applicable common law of contracts by citing a general principle of contracts that "[e]ven where the law requires a tender, such tender is excused if it would be futile."[167] The court primarily relied upon the question of whether a tender in the case would be futile as a material issue of disputed fact, which alternately would require denial of the employer's motion for summary judgment.[168]

In rejecting the ordinary contract principles asserted in *Grillet* and *O'Shea* and by the employer,[169] the *Isaacs* court harshly criticized the distinction between whether a tender of consideration is a condition precedent to bringing an action to challenge a waiver and whether the retention of benefits constitutes a ratification of the waiver:

> States that require a tender to challenge a release sometimes use language of "condition precedent to suit," and sometimes use

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163. *Id.*

164. *Id.* at 1372 (citing Ruggles v. Selby, 165 N.E.2d 733, 743 (Ill. App. Ct. 1960) (holding no tender necessary to void a release for mutual mistake of law); Worthey v. Cleveland, C.C. & St. L.R. Co., 251 Ill. App. 585 (1929) (holding tenders to be required in certain circumstances but not others)).

165. *Isaacs*, 765 F. Supp. at 1372 (citing RESTATEMENT OF CONTRACTS § 480 (1932); Taxin v. Food Fair Stores, Inc., 197 F. Supp. 827 (E.D. Pa. 1961)).

166. *Isaacs*, 765 F. Supp. at 1372 (citing RESTATEMENT OF CONTRACTS (SECOND) § 384(1)(b) (1979)).

167. *Isaacs*, 765 F. Supp. at 1374 (citing Needy v. Sparks, 393 N.E.2d 1252, 1255 (Ill. App. Ct. 1979); 74 AM. JUR. 2D *Tender* §§ 4, 5 (1964)).

168. *Isaacs*, 765 F. Supp. at 1374.

169. *Id.* at 1372 (citing *Grillet*, 927 F.2d 217).

> the language of "ratification." But there is no meaningful difference between the two. It is impossible to understand how a person can ratify a release by not making a tender if he can sue to challenge the release without making a tender. No state court decision cited by [the employer] has explained the difference between the failure to tender as barring suit and failure to tender as constituting "ratification."[170]

The overriding issue for the court consisted of whether a tender requirement should be imposed for challenging releases under remedial federal statutes.[171] Based upon the Supreme Court's decision in *Hogue*, the provisions and purposes of the ADEA as amended, and varying principles of contract law, the *Isaacs* court concluded that no such requirement existed for plaintiffs under the ADEA.[172]

Nearly a year later, the Eleventh Circuit Court of Appeals reached the same conclusion in *Forbus v. Sears Roebuck & Co.*, relying heavily upon the holding and rationale of *Isaacs*.[173] In *Forbus*, the four plaintiffs had been employed at a retail distribution center of Sears, Roebuck and Company when the company informed them that plans to convert the center to other uses would involve a substantial reduction in jobs.[174] The company offered the employees a severance incentive package, requiring as a condition the execution of a waiver that precluded the retiring employee from bringing any action against the company as a result of termination.[175] After each employee accepted the severance package and received the promised benefits, the company changed the restructuring plans and converted the center into a different facility that required more jobs than anticipated previously.[176] The retirees asked for their jobs back but were informed that none were available. Thereafter, the retirees filed charges of age discrimination with the EEOC alleging that the ADEA had been violated, that the waivers had been executed under duress, and that the misrepresentations which had been made by the company constituted breach of contract and fraud.[177] None of the retirees tendered severance payments back to the company.[178] Instead,

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170. *Id.* at 1373.
171. *Id.* at 1376.
172. *Id.*
173. Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992).
174. *Id.* at 1038.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*

the retirees offered to offset any award received in the lawsuit by the amount of accepted severance pay.[179]

The district court granted summary judgment to the employer on state law claims because the retirees had been at-will employees and because the retirees failed to state a claim for breach of contract.[180] In arriving at its decision, the court noted that the retirees "sustained no recoverable damages, even if Sears were guilty of fraud."[181] The district court determined that the "offer to offset any award [constituted] sufficient tender" to the allow the suit under state law.[182] The retirees' ADEA claims remained for consideration by the Court of Appeals.[183] The Eleventh Circuit accepted the appeal on the basis of the collateral order doctrine.[184] The court also considered a simultaneous motion for summary judgment by the company on the basis that the retirees had unconditionally failed to tender back severance payments, thereby ratifying the waivers, even if questions of fact existed regarding the validity of the waivers based on duress and fraud.[185]

The Eleventh Circuit reviewed the ratification issue de novo and considered the company's twin arguments: (1) even if the waivers were "tainted by misrepresentation or duress," the retirees ratified the waivers "by accepting the benefits," and (2) if the retirees were allowed to retain the severance benefits while maintaining the lawsuit, the company would be denied the benefit of its bargain.[186] In response, the retirees contended that the "tender back of the severance benefits [was] not an absolute requirement."[187] The court cited the Supreme Court's decision in *Hogue* to reverse the district court's application of state law to the issue of a tender requirement under the ADEA.[188] Moreover, the court agreed with the citation of *Hogue* as controlling law in *Isaacs* and followed the holding in *Hogue* that where rights are conferred by a remedial federal statute designed to protect employees, "whether a tender back . . . [is]

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179. *Id.*
180. *Id.* at 1039.
181. *Id.*
182. *Id.* at 138-39.
183. *Id.*
184. *See supra* note 89 and accompanying text. The collateral order doctrine allows an exception to the general rule that interlocutory appeals are not appealable. The dissent argued that the collateral order doctrine did not apply and that the employer's asserted right not to be sued because of the waivers was not sufficiently important to justify an interlocutory appeal. *Forbus*, 958 F.2d at 1042-43.
185. *Id.* at 1038-39.
186. *Id.* at 1040-41.
187. *Id.* at 1040.
188. *Id.* at 1041.

a prerequisite to the bringing of the suit is to be determined by federal rather than state law."[189]

The court acknowledged the decisions by the Fourth and Fifth Circuits in *O'Shea* and *Grillet* but held *Hogue* to be binding precedent and adopted the public policy considerations of *Isaacs* as persuasive authority.[190] The court also adopted by analogy the finding in *Hogue* that a tender requirement would deter meritorious challenges to waivers in FELA lawsuits:

> The same deterrence factor applies to ADEA claims. Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would, in our opinion, encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company. The ADEA was specifically designed to prevent such conduct, and we reject a tender requirement as a prerequisite to instituting a challenge to a release in an ADEA case.[191]

The court affirmed the district court's denial of summary judgment to the employer by holding as a matter of federal law that ADEA plaintiffs are not required to tender back consideration received for waivers and that retention of the consideration "during the pendency of a lawsuit does not constitute ratification of [the] waivers."[192] Thus, *Forbus* upheld unequivocally the right of an individual to challenge the validity of an ADEA waiver, without condition precedent or conflicting interpretations of the common law of contracts.[193]

D. Impact and Post-OWBPA Implications of Isaacs *and* Forbus

The precedent established in *Forbus* and *Isaacs* provided authority for district courts deciding first impression issues regarding the validity of waivers under the OWBPA.[194] By the middle of 1992, two district courts had followed *Isaacs* and *Forbus* to hold that discharged workers who failed to return severance benefits did not lose their right to bring an ADEA action if they had executed waivers that were invalid under

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189. *Id.* at 1040 (citing *Hogue*, 390 U.S. at 517).

190. *Forbus*, 958 F.2d at 1040-41.

191. *Id.* at 1041.

192. *Id.*

193. *Id.*

194. Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill, Aug. 26, 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992).

the OWBPA.[195] A third district court held independently of *Isaacs* that retention of a lump sum severance payment by an individual, as opposed to continuous receipt of payments, did not constitute ratification of a voidable waiver.[196]

The mandatory nature of the minimum standards for a valid waiver under Title II of the OWBPA makes the continued uniformity of decisions following *Forbus* and *Isaacs* likely, thereby allowing challenges of waivers that are voidable under the Act. Moreover, the district court decisions that echo the holding and rationale of *Forbus* and *Isaacs* indicate the apparent soundness of the reasoning in those cases with respect to post-OWBPA waivers. In light of the rough equivalence of cases on either side of the issue, the relevant consideration mitigating in favor of the continuing force of the decisions in *Forbus* and *Isaacs* is that the cases rejecting tender or ratification theories are the most recent and deal with waivers subject to the mandatory minimum standards of the OWBPA.[197]

Although *Forbus* and *Isaacs* involved waivers that were executed before the effective date of the minimum standards for valid waivers under the OWBPA, both courts expressly intended their holdings to set precedent for waivers executed after the effective date of the OWBPA.[198] The policy behind *Forbus* and *Isaacs* was to leave the doors of courthouses open to meritorious ADEA lawsuits, while avoiding setting precedent that would allow employers to circumvent both the pre-OWBPA knowing and voluntary standard for ADEA waivers and the minimum standards in Title II of the OWBPA.[199] The risk that the courts sought to avoid involved the potential for employers to fraudulently induce the execution of severance waivers by coercion or misrepresentation with the hope that the ratification theory would preclude retirees from filing ADEA lawsuits or that retirees would not be in a financial position to return the benefits in order to meet a tender requirement within the two-year statute of limitations under the ADEA.[200] The courts reasoned that the purpose and effect of the OWBPA would be nullified if employers were able to obtain waivers under such circumstances.[201]

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195. Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill. 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992).

196. Sperry v. Post Publishing Co., 773 F. Supp. 1557 (D. Conn. 1991).

197. Carr v. Armstrong Air Conditioning, Inc., 817 F. Supp. 54 (N.D. Ohio 1993); Pierce v. Atchison, Topeka and Santa Fe Ry. Co., 1993 WL 18437 (N.D. Ill. Jan. 26, 1993); Oberg v. Allied Van Lines, Inc., 1992 WL 211506 (N.D. Ill., Aug. 26, 1992); Collins v. Outboard Marine Corp., 808 F. Supp. 590 (N.D. Ill. 1992).

198. *Forbus*, 958 F.2d at 1041; *Isaacs*, 765 F. Supp. at 1371.

199. *Id.*

200. 29 U.S.C. § 626(e)(1) (1988).

201. *Forbus*, 958 F.2d at 1036; *Isaacs*, 765 F. Supp. at 1359.

III. The Model Amendment

Title II of the OWBPA does not expressly provide an individual with the right to retain consideration received from the execution of a waiver during a challenge of the validity of the waiver in court. Nor does Title II contain provisions addressing a tender back requirement or ratification of a waiver. Moreover, nothing in the legislative history of the OWBPA addresses the issue. Title II presently allows an individual seven days during which to revoke a waiver,[202] but employers customarily do not give consideration until after expiration of the revocation period. However, disputes over the right of an individual to bring a subsequent ADEA lawsuit arise after execution of a waiver and exchange of severance benefits. Courts may review the underlying purposes of the ADEA and the OWBPA for persuasive authority, but along with absolute rejections of the federal law, differing interpretations and constructions will inevitably produce a gray area of the law. Thus, the appellate split cannot be resolved by the provisions of the ADEA as it currently stands. Amendment of the ADEA will provide a simple and necessary resolution of the appellate split.

A. Need for Amendment

Amendment of the Title II provisions of the OWBPA is necessary not only to resolve the judicial inconsistencies perpetuated by the appellate split, but also to address underlying concerns of considerable social and economic value. First, the increasing use of severance waivers as a method of corporate restructuring and necessary reductions in the size of operations, coupled with the aging of the "baby boom" generation, means that more older workers and their employers will be encountering and using unsupervised waivers.[203] The continued existence of the appellate split casts an irresolvable uncertainty upon the prerequisites for execution of valid unsupervised waivers of ADEA rights and claims. The recurring question facing employers and employees alike involves whether the minimum standards of Title II apply by mandate of Congress or instead whether employers are free to use any method of inducement in the hope that the individual will ratify the waiver through conduct or a failure to meet a tender back requirement. Such uncertainty threatens to stall the economic and social benefits and necessities addressed through the use of waivers of age discrimination claims in the termination or discharge of employees. In the wake of such uncertainty, the split of authority will deter the use of valid waivers and the filing of meritorious

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202. 29 U.S.C. § 626(f)(1)(G) (Supp. 1993).

203. *See* Rice, *Wooing Aging Baby Boomers*, Fortune, Feb. 1, 1988, at 68.

lawsuits challenging invalid waivers. In sum, the economic benefits for both sides will be deterred with the costs passed to society.

Amendment of Title II will preserve the effectiveness of the OWBPA, a piece of legislation that evolved through carefully calculated developments over several years, representing the interests of employers and employees as forwarded and considered by the EEOC, Congress and the courts. Employers have had the judge-made right to obtain waivers of age discrimination claims for approximately twenty years. Older workers have been guaranteed express federal statutory protections and remedies aimed at eliminating discriminatory practices since the enactment of the ADEA in 1967. Moreover, ambiguity regarding the applicability of the minimum standards in Title II threatens to thwart the clear congressional intent behind the OWBPA. An amendment resolving the split of authority will help to guarantee that the mandatory standards of Title II achieve widespread use.

A final relevant consideration supporting the necessity of amendment by Congress involves the current composition of the Supreme Court. When the Supreme Court's decision in *Betts* conflicted with the congressional intent underlying the ADEA, Congress was forced to quickly respond with the enactment of the OWBPA to preserve the protections of the ADEA with respect to employee benefits.[204] The Supreme Court has declined two opportunities to resolve the issues of tender and ratification involved in the appellate split.[205] However, the willingness of the Court to narrowly construe the protections accorded older workers by the ADEA provides a further incentive for Congress to take the initiative of resolving the issue before another decision by the Court is handed down that potentially conflicts with the congressional intent and stated purposes behind the ADEA.

B. Proposed Amendment to Title II of the OWBPA

The amendment of the ADEA should be consistent with the holdings of *Forbus* and *Hogue*. The strongest authority supporting such an amendment is found in the mandatory nature of the Title II provisions in the OWBPA. Congress clearly enacted the OWBPA to set mandatory minimum standards for unsupervised waivers of rights and claims under the ADEA, not as mere recommendations. The 1968 Supreme Court decision of *Hogue* instructs that federal remedial statutes provide controlling law

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204. *See supra* note 1.

205. Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992); O'Shea v. Commercial Credit Corp., 930 F.2d 358 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 177 (1991).

in disputes over waivers of such statutory protections.[206] At the heart of the matter lies the attempt by Congress to ensure that waivers of age discrimination claims are knowingly and voluntarily executed in order to prevent the use of coercion or fraud.

The incorporation of the *Forbus* holding in the model amendment is consistent with the legislative history of the OWBPA. Title II of the OWBPA incorporated the holdings of federal appellate decisions regarding the non-waivability of the EEOC's right to pursue a charge of age discrimination and the minimum standards necessary to guarantee a knowing and voluntary waiver.[207] Lastly, the codification of an offset deduction finds support in *Hogue* and the American Law Institute Restatements of Contracts.[208]

The following is a model amendment, not in statutory form, which could be incorporated into Title II of the OWBPA as a final provision of 29 U.S.C. section 626.

RETENTION OF SEVERANCE BENEFITS DURING CHALLENGES UNDER THE ADEA

1. The purpose of this section is to permanently resolve the inconsistencies wrought by the federal courts with regard to the rights of ADEA plaintiffs to challenge the validity of waivers falling under the effective date of Title II of the OWBPA.

2. Any individual or group of individuals challenging the validity of a waiver or waivers executed since the effective date of Title II of the OWBPA shall not be required to tender the consideration received for such waiver or waivers as a condition prerequisite to challenging those waivers in court.

3. The retention of such consideration from a waiver by an individual or individuals challenging the validity of a waiver or waivers under the Act during the pendency of a lawsuit shall not constitute ratification of such a waiver or waivers.

4. Except as such a waiver may otherwise bar recovery, or as equitable relief may be appropriate under the ADEA, a deduction from the sum of damages paid to an individual or

206. *Hogue*, 390 U.S. 516. *See supra* text accompanying note 140.

207. EEOC v. Cosmair, Inc. L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987) (waivers of the right to file a charge with the EEOC void as a matter of public policy); Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988) (adopting minimum standards for knowing and voluntary waiver of rights and claims under the ADEA).

208. *See Isaacs*, 765 F. Supp. at 1366 (citing *Hogue*, 390 U.S. at 518), at 1372 (citing RESTATEMENT OF CONTRACTS § 480 (1932); RESTATEMENT OF CONTRACTS (SECOND) § 384(1)(b) (1980)).

individuals whose rights under the Act have been violated shall be made in the amount of any enhanced benefits received in exchange for execution of an ADEA waiver.

C. Impact Of The Proposed Amendment

The amendment should make an invalid waiver under Title II of the OWBPA voidable, regardless of the retention of benefits by an individual during a challenge of the waiver. The waiver will remain voidable before and during adjudication. The amendment will provide an unambiguous statement of the law of ADEA waivers for the courts and promises to restore effective use of waivers for employers and employees.

The safeguards of the rules of civil procedure already deter challenges of valid waivers. For example, Rule 11 of the Federal Rules of Civil Procedure provides a check against frivolous lawsuits.[209] Motions for failure to state a claim upon which relief may be granted under Rule 12 also prevent the progress of claims without merit in the federal courts.[210] Additionally Rule 50 motions for judgment as a matter of law and Rule 56 motions for summary judgment may be used for early disposition of unmeritorious lawsuits or deficient pleadings.[211]

IV. Conclusion

Congress included Title II in the OWBPA to expressly safeguard the execution of unsupervised waivers of individual rights and claims under the ADEA through mandatory minimum standards of validity. The existing split of authority between the United States Courts of Appeals threatens to undo the mandate of Congress. This Note challenges Congress to amend Title II of the OWBPA. Such amendment will resolve the controversy of the appellate split and will provide a more certain future for the use of unsupervised waivers of rights and claims under the ADEA. Congress intended the ADEA not only "to prohibit arbitrary age discrimination in employment," but also "to help employers and workers find ways of meeting problems arising from the impact of age on employment."[212] Enforcement of waivers under Title II of the OWBPA provides the necessary means for meeting this goal.

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209. Fed. R. Civ. P. 11.
210. Fed. R. Civ. P. 12(b).
211. Fed. R. Civ. P. 50, 56.
212. 29. U.S.C. § 621(b) (1988).

The Morals of the Story: Narrativity & Legal Ethics

RALPH E. DOWLING*

INTRODUCTION

> The fact that the case is always a narrative means something from the point of view of the litigant in particular. For him the case is, at its heart, an occasion and a method in which he can tell his story and have it heard. He has the right to a jury, to ensure that he will have an audience that will understand his story and speak his language. The presence of a jury requires that the entire story, on both sides, be told in ordinary language and made intelligible to the ordinary person. This is a promise to the citizen that the law will ultimately speak to him, and for him, in the language that he speaks, not in a technical or special jargon. . . . It is our law, and it must make sense to us.[1]

For many years, legal scholars failed to acknowledge the narrative dimensions of legal discourse. This failure still surprises some legal scholars. David Papke, an influential scholar of legal narratives recently asked, rhetorically, "In light of the pervasiveness and importance of narrative in the legal discourse, how is it that legal education, practice and scholarship have for the most part seemed oblivious and even disdainful of narrative?"[2]

The number and influence of narrative studies of legal discourse is growing. According to Jane Baron,

> The notion that storytelling is ubiquitous in the law . . . has recently attained something like the status of a truth universally acknowledged. Interest in storytelling and the law has been

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1. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 265 (1984) (footnote omitted).

2. DAVID RAY PAPKE, NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 2 (1991) [hereinafter NARRATIVE AND THE LEGAL DISCOURSE]. Papke also notes that law's failure to acknowledge the importance of narratives may well arise from the law's adoption of epistemological positions (positivism and scientism) which deny the importance of narratives. *Id.* at 2-3. The prevalence of these epistemological positions is discussed, *infra*, part IV.

> expressed from a dizzying variety of directions, including critical legal studies, feminist jurisprudence, law and economics, the new pragmatism, and critical race theory.[3]

Similarly, Robert Cover noted that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[4] The emergence of narrative legal studies still surprises some. Steven Winter finds "something surprising in the turn to narrative by modern legal scholars" and notes that when "prestigious law reviews publish symposia reflecting on the comparison between law and literature and on the relationships between law and narrative . . . something unusual is afoot."[5]

The place of narrative legal studies has been firmly established. Although "the dependence of law upon narrative has at times been hidden from attention under attempts to expound law as an autonomous, rational system composed of rules or principles, the work of the early legal narrativists has firmly established law's dependence on narrative."[6] Thus, legal narrativists today can "get on with the business of exploring the relation without having to argue its legal-academic legitimacy."[7]

While the eventual effect of narrative studies on legal scholarship and practice cannot now be predicted, the currently dominant positivist paradigm of legal studies[8] might eventually give way to the narrative approach. Such paradigm shifts often occur suddenly.[9]

Legal scholars are not alone in "discovering" the importance of narratives. "Narrative has received a great deal of attention in recent

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3. Jane B. Baron, *The Many Promises of Storytelling in Law*, 23 RUTGERS L.J. 79 (1991) (reviewing DAVID RAY PAPKE, NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW, (1991) (footnotes omitted)) [hereinafter, *The Many Promises*].

4. Robert Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983) *quoted in* Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989).

5. Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2227 (1989) (footnotes omitted).

6. Ball, *supra* note 4, at 2280, n.1.

7. *Id.*

8. NARRATIVE AND THE LEGAL DISCOURSE, *supra* note 2, at 2, 8.

9. The term "paradigm shift" is Thomas Kuhn's. A paradigm is a world view and a way of viewing problems shared by practitioners in a field of science. "According to Kuhn's analysis, movement from one paradigm to another—a paradigm shift—is a 'transition between incommensurables' and cannot be made gradually as a result of neutral experience and logic but 'must occur all at once (though not necessarily in an instant) or not at all.'" Ernest G. Bormann, *Symbolic Convergence Theory: A Communication Formulation*, 35 J. COMM. 128, 136 (1985) (quoting THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 150 (2d ed. 1970)).

years, not simply in the corridors of literature departments but throughout the various disciplines of the human sciences, ranging from anthropology to linguistics and from jurisprudence to sociology."[10] Communication ethicist Richard Johannesen has seen scholars "in such disciplines as anthropology, sociology, law, history, literary criticism, and rhetoric . . . exploring the centrality of narrative to human belief and action."[11]

Along with a growing interest in narrative approaches to analyzing legal discourse, legal scholars have a growing interest in legal ethics. This interest is reflected in the relatively recent adoption of the American Bar Association's *Model Rules of Professional Conduct* in 1983, and the recent adoption in many jurisdictions of the Multistate Professional Responsibility Examination (MPRE) as a prerequisite for bar admission.[12]

The concern for ethics may result from a number of factors, including the fact that legally ethical conduct may violate popular moral precepts, the association of lawyers with disliked clients, the controversy among lawyers as to the exact nature of ethical conduct, and the ethical failures of too many lawyers.[13] After all, the practice of law is fraught with ethical dilemmas. For example, zealous representation may require "the systematical presentation of falsehood."[14] Even if falsehood is not required of the attorney, distortion of facts may be.[15] Lawyers, as well as lay people, find these ethical dilemmas troublesome.[16]

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10. John Louis Lucaites & Celeste Michelle Condit, *Re-Constructing Narrative Theory: A Functional Theory*, 35 J. Comm. 90 (1985) (footnotes omitted); Lucaites and Condit also note the "growing belief that narrative represents a universal medium of human consciousness." *Id.* at 90.

11. Richard L. Johannesen, Ethics in Human Communication 254 (3d ed. 1990).

12. As of late 1992, 42 jurisdictions require the MPRE as part of the requirements for bar admission. National Conference of Bar Examiners, Multistate Professional Responsibility Examination: 1993 Information Booklet 1 (1992).

13. Sissela Bok, *Can Lawyers Be Trusted*, 138 U. Pa. L. Rev. 913, 913-14 (1990).

14. Kathleen S. Bean, *A Proposal for the Moral Practice of Law*, 12 J. Legal Prof. 49 (1987).

15. Donald H. Green, *Ethics in Legal Writing*, 35 Fed. B. News & J., 402, 403 (1988).

16. One former attorney, for example, has written: "There is something odd when a lapsed lawyer writes about the practice of law, but I've got something to get off my chest. I didn't like some of the things I did as a lawyer. I took positions I didn't believe in. I made arguments that I thought bordered on untrue. I postured. I bluffed. I pursued advantages provided more by clients' resources than the value of their claims." Richard A. Matasar, *The Pain of Moral Lawyering*, 75 Iowa L. Rev. 975 (1990).

The concern with ethics is multifaceted. Critics bemoan a number of evils and causes, and propose myriad cures. Shaffer, for example, believes legal ethics is dominated by the "adversary ethic," which he describes as "unique, novel, and unsound."[17] Shaffer even holds that legal ethics "is not ethics" at all.[18]

This Note brings together these interests in legal narratives and ethics by describing previous narrative legal studies and the relationship between communication and the law. It then presents Walter Fisher's narrative paradigm of communication, and compares it with the positivist rational-world paradigm currently dominant in legal studies and practice. Finally, it demonstrates how many of the current rules of legal ethics reflect the rational-world paradigm, and analyzes legal ethics from the perspective of the narrative paradigm.

I. Selected Narrative Perspectives On Law

According to Baron, narrative legal studies fall into three types. The three types of studies have examined: (1) "the place in legal education and doctrine of the personal stories of actual people;" (2) "the stories that legal doctrines tell about the world . . . ;" and (3) "the way in which stories are or can be used strategically as a method to enhance the quality of communication between actors in legal settings."[19]

Even a cursory discussion of the many recent narrative studies would be beyond the scope of this Note.[20] However, a brief survey of a few narrative studies from this third category—narrative studies of the trial—will help show the importance of narrative studies of legal discourse.

A basic but important result of the narrative studies of legal discourse has been an acknowledgment of the crucial role that narrative plays in the trial—the centerpiece of legal discourse. Kim Lane Scheppele has observed that "resolution of any individual case in the law relies heavily on a court's adoption of a particular story, one that makes

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17. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 Vand. L. Rev. 697 (1988).

18. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963 (1987).

19. *The Many Promises*, *supra* note 3, at 80-81.

20. *See id.*, *passim*, for an excellent critical discussion of many recent narrative studies. Collections of narrative and related studies of legal discourse can be found, *e.g.*, in 9 Legal Stud. F. 123 (1985); 87 Mich. L. Rev. 2073 (1989); and Papke, Narrative and the Legal Discourse, *supra* note 2. Attempts to explicate language-based theories of legal discourse are found in Bernard S. Jackson, Law, Fact and Narrative Coherence (1988); and Peter Goodrich, Legal Discourse (1987).

sense, is true to what the listeners know about the world, and hangs together.''[21]

Narratives are essential to the law because the centerpiece of the law—the trial—''is organized around storytelling.''[22] The actors in trials ''organize, and analyze the evidence that bears on'' the issues in the trial ''[t]hrough the use of broadly shared techniques of telling and interpreting stories.''[23] Given that storytelling is the essence of trials, legal educators have been slow to provide training in storytelling. Scheppele noted:

> [U]nlike rules of law, which are explicitly taught and tested in law schools, the craft of legal storytelling is generally left to the practitioner to learn and develop without formal and systematic training. And though this craft is constrained by rules of evidence and the demands of legal relevance, there are few formal legal rules providing guidance on how the lawyer or judge should structure stories.
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> Yet, it matters a great deal how stories are framed. The same event can be described in multiple ways, each true in the sense that it genuinely describes the experience of the storyteller, but each version may be differently organized and give a very different impression of 'what happened.' And different legal consequences can follow from the choice of one story rather than another.[24]

The importance of storytelling skills was demonstrated in Bennett and Feldman's narrative study of trials, which found that trial outcomes are, indeed, affected by participants' storytelling skills. The study confirmed the theoretical prediction of narrative scholars that ''the way in which a story is told will have considerable bearing on its perceived credibility regardless of the actual truth status of the story.''[25]

The importance of narrative communication skills was also demonstrated by Gill's study of the communication strategies of trial lawyer Gerry Spence. The study revealed how Spence's use of narrative and other techniques contributes to his success.

> Legal discourse and judgment have been described as storytelling, yet the narrative created by Spence goes considerably

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21. Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2080 (1989) (footnotes omitted).

22. W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 3 (1981) [hereinafter RECONSTRUCTING REALITY].

23. *Id.* at 4.

24. Scheppele, *supra* note 21, at 2085 (footnotes omitted).

25. RECONSTRUCTING REALITY, *supra* note 22, at 89.

> beyond a functional method of organizing information coherently and efficiently. He creates a mythos, a reality to be believed and relived. Further, this narrative is not merely an alternate vision of what happened. . . . It is instead an epic struggle of good and evil by simplistic characters with uncomplicated motives. As Spence weaves his tale, he . . . puts himself into the drama [and] invites participation by the jury.[26]

Narrative legal scholars have concluded that storytelling is the essence of trials, and that narrative performances affect trial outcomes. This illustrates the close connection between narrative and legal studies, but much more will be said of this connection.

II. The Relationship of Law and Communication

The importance of narratives in trials is hardly surprising since trials are little more than communication exercises. Trials are not about "things" and "people." They are about communication about people and things. In trials, "decisions cannot be made about individuals, but only about information about individuals."[27] This information "is only available to a trial's decision makers via the persuasive messages" presented to them.[28]

> But how does one know truth when one finds it? Truth isn't a property of an event; truth is a property of an *account* of the event. As such, it has to be perceived and processed by someone, or else it couldn't be framed in language to count as an account at all. On the objectivist view, the potential "someones" who might observe and report are interchangeable; as long as they approach the task of description in the proper spirit, the description does not depend on who the observers are. . . Observers, even those not directly involved in a dispute, bring with them a conceptual scheme already formed, a set of presuppositions and expectations, that influences what they see and report. Getting a group of observers to come up with the same description simply shows that one has found a group that

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26. Ann M. Gill, *The Oral Tradition of Gerry Spence in Pring v. Penthouse*, 17 Sw. L. Rev. 693, 695 (1988) (footnote omitted).

27. D. M. Gotfredson, Decision-Making in the Criminal Justice System: Reviews and Essays 68 (1975), *quoted in* Michael G. Parkinson, Deborah Geisler & Mary Hinchcliff Pelias, *The Effects of Verbal Skills on Trial Success*, 20 J. Am. Forensic Ass'n 16 (1983).

28. Parkinson, Geisler & Pelias, *supra* note 27, at 16.

> shared the same conceptual scheme at the start and followed the same instructions for observation.[29]

Trial outcomes, then, depend upon communication about the world, not upon the actualities of the world. Thus, the communication practices of trial participants will directly affect trial outcomes. This is not to suggest that reality has no effect on trial outcomes, but only that it has less to do with trial outcomes than most persons would believe.

> The physical or "object" world enters the production of justice only at several steps removed from the terms on which judgments are ultimately based. In this fluid symbol system, the real world and the symbolic representation of it in the courtroom are in tension. On the one hand, courtroom stories must be built on definitions of the material evidence that comes from the incident in question. In this sense "the facts" do exercise some constraint over the possible stories that can emerge in a case. However, the constraint is considerably less binding than the conventional mythology of justice shared by most legal professionals and ordinary citizens would indicate.[30]

If communication and narrative skills are important to understanding trials and successful trial practice, narrative studies are essential. And communication skills are indeed central to trial outcomes. "People who cannot manipulate symbols within a narrative format may be at a disadvantage even when, as witnesses or defendants, they are telling the truth."[31]

Other studies have found communication skills intimately tied to trial outcomes. Parkinson examined the communication of prosecutors, defense attorneys, and defendants. He found that a few specific communication skills predicted trial outcomes with over seventy-five percent accuracy for each group.[32] Parkinson, Geisler and Pelias' study of civil

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29. Scheppele, *supra* note 21, at 2090 (footnotes omitted) (quoting NELSON GOODMAN, WAYS OF WORLDMAKING 6 (1978) (footnotes omitted)).

30. RECONSTRUCTING REALITY, *supra* note 22, at 143-44.

31. *Id.* at 6.

32. The exact numbers were: for prosecution attorneys, 77% accuracy; for defense attorneys, 81% accuracy; and for defendants, 84% accuracy. Successful prosecution attorneys asked questions about past events, made statements about future events, and were verbose; while unsuccessful prosecution attorneys used conditional language, polite language forms, and hyper-correct grammar as defined in prior studies on women's speech. Successful defense attorneys made references to abstract concepts (e.g., honor, justice), asked questions about past events, and used legal jargon; while unsuccessful defense attorneys used grammatically complete sentences and words with concrete physical referents (e.g. car, house). Successful defendants used grammatically complete sentences

trials confirmed the findings of Parkinson's study of criminal trials. It "demonstrated that the verdicts of judges and juries in civil trials co-occur with variations in the language behavior of trial participants just as the preliminary study demonstrated a similar relationship for criminal trials."[33]

A true understanding of the significance of these results requires recognition that these purely formal communication variables may be more important in dictating trial outcomes than are argument structures or evidence use.[34] This suggests that communication and narrative studies may be more useful to trial lawyers than the logical and doctrinal studies which have dominated traditional legal scholarship.[35]

Understanding the narrative nature of trials is also important to legal scholars seeking to understand what occurs in actual trials. A scholar operating "under the misguided assumption that trials involve the straightforward presentation and testing of facts" and who fails to recognize the narrative nature of the trial will find it "virtually impossible to spot general patterns in the structure of cases or to identify basic prosecution and defense strategies that explain the significance of these patterns."[36]

Contemporary scholars' interest in analyzing and discussing the interface between communication and law should not, after all, surprise us. The academic field of "speech communication" traces its roots to the first teachers of rhetoric—Corax and Tisias of Syracuse—who originated the teaching of rhetoric in the fifth century B.C., by teaching fellow citizens how to argue persuasively in the courts for the return of property confiscated by a recently toppled despot.[37]

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and polite language forms, while unsuccessful defendants made multiple references to themselves. Michael G. Parkinson, Language Variation and Success in the System of Criminal Justice (research report produced under LEAA Grant #77NI-99-0057, 1978), *cited in* Parkinson, Geisler & Pelias, *supra* note 27, at 17. The prior studies in women's speech referred to are found in R. LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975).

33. Parkinson, Geisler & Pelias, *supra* note 27, at 22. However, translating these results into successful trial practice may be difficult, however, for "the difference between a successful and unsuccessful courtroom performance may be only a few words per thousand." *Id.* at 21.

34. *Id.* at 18.

35. Recognition that communication skills have a tremendous effect on trial outcomes does not insult juries. The jury "is not an illiterate tribe, spellbound by a chanting poet; they are rational descendants of Platonism who can listen to reason and could be persuaded to discount overly emotional presentations." If anything is to blame, it is "the format of a trial . . . with its emphasis on orality, on advocacy, and on retelling the 'story.'" Gill, *supra* note 26, at 706.

36. RECONSTRUCTING REALITY, *supra* note 22, at 93.

37. GEORGE A. KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR

Although the study of rhetoric and communication[38] and the study of law have long been associated, their relationship in recent years appears to have been unilateral. Rhetorical scholars have continued to study the law,[39] while legal scholars, until very recently, have given communication issues short shrift. The key to restoring reciprocity between rhetorical and legal scholars lies in finding a theoretical perspective that provides insights into both law and communication. The subsequent section of this Note describes a communication theory which may meet this need.

III. The Narrative Paradigm of Communication

Speech communication scholars have been giving a great deal of attention to communication scholar Walter Fisher's narrative paradigm. This popularity is attributable to some of the paradigm's intrinsic features and its promise as a theoretical tool for understanding communication.

Tradition from Ancient to Modern Times 18-19 (1980). Eventually, the spark ignited by Corax and Tisias found its way to the democratized Greek city-states, which witnessed the fullest bloom of rhetorical study and practice prior to the modern age. The Golden Age's fullest expression of the art and study of rhetoric is the *Rhetoric* of Aristotle, which identified three genres of rhetoric: *epideictic* (speeches of praise and blame), *deliberative* (legislative speeches), and *forensic* (speeches to the law courts), and provided speakers with different advice for each. Aristotle, Rhetoric, Book I, Chapter 3.

Among the lasting insights of Aristotle is the idea that forensic discourse entails certain stock issues or *stases*. These *stases* include: (1) the act was not committed, (2) the act did no harm, (3) the act was less than charged, and (4) the act was justified. "Later, another forensic issue was added by the Romans; it was the question of procedure. The essential issues of forensic debate are today the same as Aristotle and the Romans proposed." Walter R. Fisher, Human Communication as Narration: Toward a Philosophy of Reason, Value, and Action 30 (1987) [hereinafter Communication as Narration]. Rome's greatest rhetorical scholar and practitioner was Cicero—the preeminent courtroom lawyer of his time. *See, e.g.*, Kennedy, *supra* this note, at 90-96.

38. I am using the terms "rhetoric" and "communication" interchangeably. This may be confusing to persons outside the academic field of speech communication. Although not without some controversy, this use of these terms is common. *See* Sonja K. Foss, Rhetorical Criticism: Exploration & Practice 3-4 (1989).

39. Studies of legal communication have been a mainstay of academic journals in speech communication, are frequently presented and discussed at professional conferences in the field, and are the joint interest bringing together the members of several regional and national professional associations. Speech communication faculty often teach courses in legal communication. A good place to enter this field of inquiry would be the proceedings of the 1983 Summer Conference on Communication Strategies in the Practice of Lawyering, sponsored by the Speech Communication Association, American Forensic Association, and Western Forensic Association. Ronald J. Matlon & Richard J. Crawford, eds., Communication Strategies in the Practice of Lawyering (1983).

A. The Attractiveness of the Narrative Paradigm

One attractive feature of the narrative paradigm is that it appears to be a general, rather than a specific, theory. General theories attempt to account for "tendencies in human communication events that cannot be ignored or rescinded by the participants. General theories are transhistorical and transcultural; they are analogous to the theories of the natural sciences that account for broad classes of events."[40] Fisher says of his paradigm, that "what can be said about interpreting and assessing one kind of discourse, using the narrative paradigm, can in principle be said about interpreting and assessing any other kind of discourse."[41]

The generality of the narrative paradigm is a consequence of Fisher having begun "with the assumption that humans are essentially storytellers," and going on to assert that "beneath the *learned* and *imposed* structures by means of which we give discourse such forms as 'argument,' 'exposition,' 'drama,' and 'fiction,' the human species is always pursuing a *narrative logic* . . . Constructing, interpreting, and evaluating discourse as 'story' remains our primary, innate, species-specific 'logic.'"[42] Thus, "regardless of genre, discourse will always tell a story and insofar as it invites an audience to believe it or to act on it, the narrative paradigm and its attendant logic, narrative rationality, are available for interpretation and assessment."[43]

Others believe in the centrality of narrative in human communication.[44] Bennett and Edelman believe stories "are among the most universal means of representing human events" and that stories are an effective means of communication because "a well-crafted narrative can motivate the belief and action of outsiders toward the actors and events caught up in the plot."[45]

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40. Bormann, *supra* note 9, at 129.

41. COMMUNICATION AS NARRATION, *supra* note 37, at 86.

42. Carroll C. Arnold, *Foreword* in HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION ix (Walter R. Fisher, 1987).

43. Walter R. Fisher, *Clarifying the Narrative Paradigm*, 56 COMM. MONOGRAPHS 55, 56 (1989).

44. A collection of articles by scholars in speech communication on the narrative approach to human communication can be found in Colloquy, *Homo Narrans*, 35 J. COMM. 73 (1985).

45. W. Lance Bennett & Murray Edelman, *Toward a New Political Narrative*, 35 J. COMM. 156 (1985). Recognition of the irreplaceable role of narrative in rhetorical transactions has been traced to Quintilian and the Roman Empire. "Only narratives can explicate the proceedings to be judged. For Quintilian, the *narratio* is to moral reason what for Aristotle the syllogism is to dialectic and the enthymeme is to rhetoric: the structure of discourse uniquely able to communicate the ritual regularity of human moral habits." Michael Calvin McGee & John S. Nelson, *Narrative Reason in Public Argument*, 35 J. COMM. 139, 150 (1985).

Some scholars are attracted to the narrative paradigm because Fisher has presented narrativism as "a ground for resolving the dualisms of modernism: fact-value, intellect-imagination, reason-emotion, and so on. Stories are enactments of the whole mind in concert with itself."[46] The attractiveness of the paradigm to legal scholars lies in less ambitious promises.

> The attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law. The basic thrust of the cognitive process is to employ imagination to make meaning out of the embodied experience of the human organism in the world. In its prototypal sense as storytelling, narrative, too, proceeds from the ground up. In narrative, we take experience and configure it in a conventional and comprehensible form. This is what gives narrative its communicative power; it is what makes narrative a powerful tool of persuasion and, therefore, a potential transformative device for the disempowered.[47]

From a communication theorist's perspective, the narrative approach is also attractive because it shares an attribute currently in vogue among speech communication scholars. Many contemporary communication theories share the proposition that communication is the means by which people construct, know, understand, and change the worlds in which they live.[48] From this perspective, rhetorical compositions produce "real-fictions." They are *real* because they relate "to reality in both subject matter and purpose" and because they concern "the actual world of everyday experience," and aim to be "a reliable guide to belief and action."[49] A rhetorical composition "ultimately is a *fiction* since its advice is not, in the final analysis, susceptible of empirical verification," but the fiction "is not hypothetical; its author

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46. COMMUNICATION AS NARRATION, *supra* note 37, at 68.

47. Winter, *supra* note 5, at 2228.

48. For a discussion of many of these theories, see Ralph E. Dowling, Rhetorical Vision and Print Journalism: Reporting the Iran Hostage Crisis to America 4-26 (1984) (unpublished Ph.D. dissertation, University of Denver); Bruce E. Gronbeck, *Dramaturgical Theory and Criticism: The State of the Art (or Science?)*, 44 W.J. SPEECH COMM. 319 (1980); and Colloquy, *Homo Narrans*, 35 J. COMM. 73 (1985). Related writings in other fields include PETER L. BERGER & THOMAS LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE ON THE SOCIOLOGY OF KNOWLEDGE (1966); ERNST CASSIRER, LANGUAGE AND MYTH (1946); and HUGH DALZIEL DUNCAN, COMMUNICATION AND SOCIAL ORDER (1962).

49. Walter R. Fisher, *A Motive View of Communication*, 56 Q.J. SPEECH 131, 132 (1970).

wants and intends that it be accepted as the true and right way of conceiving of a matter; and, if he is successful, his fiction becomes one of those by which men live."[50]

Narratives are uniquely able to help humans construct their worlds because of the formal devices characteristic of narratives and because of narratives' unique ability to engage social values. Narrative "can act as the mechanism for worldmaking because . . . narratives can be compellingly authentic" as they offer "an individual's experience in the world in a direct, honest, and vulnerable way," thus making real "situations that otherwise would be almost impossible to understand through the 'rational' marshalling of facts."[51] In addition, narratives use imagery to communicate immediacy and narrative images "necessarily embed the values of the individual or group . . . relating the narrative."[52] Narratives, then, function to convey social values.[53]

The narrative paradigm is attractive because it is a general theory, it asserts that stories are the essential and uniquely human form of communication, it promises to resolve troublesome philosophical dualisms, it subscribes to the current conventional wisdom that reality is symbolically created, and it holds that stories are the essential means for conveying social values.

B. Fundamentals of the Narrative Paradigm

Fisher's narrative paradigm conceptualizes humans as *homo narrans*—the story telling animal. Fisher's presuppositions include the following:

1) Humans are essentially storytellers.
2) The paradigmatic mode of human decision making and communication is "good reasons," which vary in form among situations, genres, and media of communication.
3) The production and practice of good reasons are ruled by matters of history, biography, culture, and character.
4) Rationality is determined by the nature of persons as narrative beings—their inherent awareness of narrative probability, what constitutes a coherent story, and their constant habit of testing narrative fidelity, whether or not the stories

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50. *Id.* (emphasis added).

51. Andrew Leslie, *Arguers as Worldmakers: Narrative and the Paradox of Public Debate*, in ARGUMENT AND CRITICAL PRACTICES 161 (Joseph W. Wenzel et al. eds., 1987).

52. *Id.*

53. JACKSON, *supra* note 20, at 61.

they experience ring true with the stories they know to be true in their lives.

5) The world as we know it is a set of stories that must be chosen among in order for us to live life in a process of continual recreation.[54]

In calling narratives the essence of human communication, "narrative" is used as a term of art. Fisher notes that "narration" is not "a fictive composition whose propositions may be true or false and have no necessary relationship to the message of that composition." Instead, narratives are "symbolic actions . . . that have sequence and meaning for those who live, create, or interpret them."[55]

Although Fisher holds that narrative is essential to all forms of communication, he looks with disfavor on communication theories which hold some forms of communication apart as superior to other forms—particularly theories which hold that logical or technical discourse is superior to other forms. Because all communication is narrative, Fisher favors no form or mode of discourse.[56]

Because Fisher does not hold to a positivist world view[57], and because narratives are held to create reality for those exchanging narratives, the evaluation of narratives does not involve testing the correspondence of stories to reality. Stories are "supposed to persuade," and they "aim[] no higher than *plausibility*."[58] Thus, "[c]redibility is the issue, not facticity; and the mirror we hold is not to 'Nature' as an objective environment but to the correspondence between *character* and fact."[59] And, when narratives are tested for validity, the tests of a story's validity "apply not to the facts of the case but to their narration."[60]

Evaluation of narratives is, instead, conducted by an examination of "good reasons." "Obviously some stories are better stories than others, more coherent, more 'true' to the way people and the world

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54. COMMUNICATION AS NARRATION, *supra* note 37 at 64-65; *see also* JOHANNESEN, *supra* note 11, at 254-55.

55. COMMUNICATION AS NARRATION, *supra* note 37, at 58.

56. "The most fundamental difference between narrative rationality and other rhetorical logics is the presumption that no form of discourse is privileged over others because its form is predominantly argumentative. No matter how strictly a case is argued—scientifically, philosophically, or legally—it will always be a story, an interpretation of some aspect of the world that is historically and culturally grounded and shaped by human personality." *Id.* at 49.

57. *Id.* at 192-93.

58. McGee & Nelson, *supra* note 45, at 149.

59. *Id.*

60. *Id.*

are—in perceived fact and value. In other words, some stories better satisfy the criteria of the logic of good reasons, which is attentive to reason *and* values."[61]

Because correspondence with reality is not the test for narrative evaluations of discourse, the purpose of evaluating discourse under the narrative paradigm cannot be the ascertainment of objective truth. Instead, the purpose of narrative evaluation is to determine the usefulness of a narrative as a guide to human conduct.[62] Fisher says the "primary function of the paradigm is to offer a way of interpreting and assessing human communication that leads to . . . a determination of whether or not a given instance of discourse provides a reliable, trustworthy, and desirable guide to thought and action *in the world*."[63] Thus, "good communication is good by virtue of its satisfying the requirements of narrative rationality, namely, that it offers a reliable, trustworthy, and desirable guide to belief and action."[64]

Fisher has argued that all rhetorical discourse has, as its function, "the influencing of ethical choices."[65] By ethical choices, Fisher means choices about how persons should live. That is, choices calculated to produce "the good life." This is the classic conception of ethics.[66] Fisher asserts that the narrative paradigm "goes beyond" social-scientific communication theories by providing its own logic "for assessing stories, for determining whether or not one *should* adhere to the stories one is encouraged to endorse or to accept as the basis for decisions and actions," while social-scientific theories "ignore the role of values"; "deny the possibility of developing rational schemes for their assessment"; and "thereby disregard ultimate questions of good and evil—of the good life."[67] All narratives, then, have an ethical function.

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61. COMMUNICATION AS NARRATION, *supra* note 37, at 68.

62. Finding guides for the proper conduct of one's life is the subject matter of the philosophical study of "ethics," which Aristotle and his contemporaries defined as the search for principles by which people could live the good life. *See* WILL DURANT, THE STORY OF PHILOSOPHY 41-74 (1954); Martin Ostwald, *Foreword* to ARISTOTLE, NICHOMACHEAN ETHICS xvii-xxiv (Martin Ostwald trans., Bobbs-Merrill Paperback 1962).

63. COMMUNICATION AS NARRATION, *supra* note 37, at 90.

64. *Id.* at 95.

65. Fisher, *A Motive View of Communication*, *supra* note 49, at 131.

66. *See* note 62 *supra*. Fisher acknowledges his debt to Aristotle's notions of ethics. "One familiar with Aristotle's *Nichomachean Ethics* may notice similarities between the logic of good reasons, including the concepts of rationality and reasonableness, and the Peripatetic's notion of 'practical wisdom' (*phronesis*). . . . In short, the logic of good reasons and practical wisdom share that kind of knowledge which is the province of rhetoric." COMMUNICATION AS NARRATION, *supra* note 37, at 119 (citing ARISTOTLE, NICHOMACHEAN ETHICS 6.7 (Martin Ostwald trans., Bobbs-Merrill, 1978)).

67. COMMUNICATION AS NARRATION, *supra* note 37, at 87.

Conversely, "[a]ny ethic whether social, political, legal, or otherwise, involves narrative."[68]

C. Narrative Rationality: Probability and Fidelity

Narrative rationality is central to the narrative paradigm. Narrative rationality has two elements. The narrative rationality of communication "is tested against the principles of probability (coherence) and fidelity (truthfulness and reliability)."[69] Narrative rationality "underlies understanding and evaluation of any form of human communication that is viewed rhetorically, as an inducement to attitude, belief, or action."[70]

Narrative rationality does not deny the existence of other forms of rationality. It affirms a broader view of rationality that includes, but is not confined to, the use of traditional reasoning in the form of clear-cut argumentative structures.[71] Rather, "reason, the movement of thought that occurs in communicative transactions, is not restricted to clear-cut argumentative forms" and it is not "the individual form of argument that is ultimately persuasive in discourse."[72] While arguments and argumentative forms retain importance in narrative rationality, "values are more persuasive, and they may be expressed in a variety of modes, of which argument is only one."[73]

Narrative rationality is descriptive, not prescriptive. It attempts to describe how people *do* think, not how people *should* think. Because of this, and because narrative rationality does not favor clear-cut argumentative forms as a mode of discourse, it is more egalitarian than prescriptive approaches which favor forms which must be taught and tend to be known by elites.

> Traditional rationality is, therefore, a normative construct. Narrative rationality is, on the other hand, descriptive; it offers an account, an understanding, of any instance of human choice and action, including science. . . . Where freedom and democ-

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68. Walter R. Fisher, *Narration as a Human Communication Paradigm: The Case of Public Moral Argument*, 51 COMM. MONOGRAPHS 1, 3 (1984) [hereinafter *Moral Argument*].

69. COMMUNICATION AS NARRATION, *supra* note 37, at 47 (emphasis added).

70. Arnold, *supra* note 42, at ix.

71. "To test soundness, one may, when relevant, employ standards from formal or informal logic. . . . However, the narrative paradigm envisions reasons as being expressed by elements of human communication that are not always clear-cut inferential or implicative forms." Walter R. Fisher, *The Narrative Paradigm: An Elaboration*, 52 COMM. MONOGRAPHS 347, 349-50 (1985) (quoted in Barbara Warnick, *The Narrative Paradigm: Another Story*, 73 Q.J. SPEECH 172, 175 (1987)).

72. COMMUNICATION AS NARRATION, *supra* note 37, at 48.

73. *Id.*

> racy are ideals, narrative rationality will imply a praxis constant with an ideal egalitarian society. Traditional rationality implies some sort of hierarchical system, a community in which some persons are qualified to judge and to lead and some other persons are to follow.[74]

The elements of narrative rationality are *probability* and *fidelity*. Probability "refers to formal features of a story conceived as a discrete sequence of thought and/or action . . . ; that is, it concerns whether the story coheres or 'hangs together,' whether or not a story is free of contradictions."[75] Fidelity, on the other hand, "concerns the 'truth qualities' of a story, the degree to which it accords with the logic of good reasons: the soundness of its reasoning and the value of its values."[76]

Probability, the tendency of a story to "hang together," is tested "first by internal argumentative and structural coherence; second by . . . comparison and contrast with stories in other discourses; and third by characterological coherence, the harmony of character and action, the dependability of characters both as narrators and actors."[77]

While probability or coherence is an attribute of a story as a whole, "fidelity pertains to the individuated components of stories—whether they represent accurate assertions about social reality and thereby constitute good reasons for belief or action."[78] The "good reasons" analysis central to evaluating the fidelity of offered narratives was created by Fisher by "combining the means of analyzing and evaluating arguments offered by such writers as Toulmin, Perelman, and Ehninger and Brockriede" with stock critical questions "that can locate and weigh values."[79]

Evaluation of communication for its narrative rationality, by examining its probability and fidelity, differs significantly from the evaluation of communication by traditional rational means. Fisher identified five components of the traditional approach.

> 1) First, one considers whether the statements in a message that purport to be "facts" are indeed "facts"; that is, are confirmed by consensus or reliable, competent witnesses.

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74. *Id.* at 66.

75. *Id.* at 88.

76. *Id.*

77. JOHANNESEN, *supra* note 11, at 256-57 (citing COMMUNICATION AS NARRATION, *supra* note 37, at 47).

78. COMMUNICATION AS NARRATION, *supra* note 37, at 105.

79. *Id.* at 47-48. The stock questions determinative of values; *fact*, *relevance*, *consequence*, *consistency*, and *transcendental issues*; are discussed *infra* note 82 and accompanying text.

2) Second, one tries to determine whether relevant "facts" have been omitted and whether those that have been offered are in any way distorted or taken out of context.
3) Third, one recognizes and assesses the various patterns of reasoning, using mainly standards from informal logic.
4) Fourth, one assesses the relevance of individual arguments to the decision the message concerns, not only are these arguments sound, but are they also all the arguments that should be considered in the case.
5) Fifth, armed with the traditional knowledge that forensic issues are those of "fact," definition, justification, and procedure . . . one makes a judgment as to whether or not the message directly addresses the "real" issues in the case.[80]

"In other words," Fisher notes, "one asks whether or not the message deals with questions on which the whole matter turns or should turn."[81]

Following the framework provided by his description of the traditional logical analysis of *reasons*, Fisher described how this logic can be transformed into the analysis of *good reasons* required by narrative rationality.

1) First is the question of *fact*: What are the implicit and explicit values embedded in the message?
2) Second is the question of *relevance*: Are the values appropriate to the nature of the decision that the message bears upon? Included in this question must be concern for omitted, distorted, and misrepresented values.
3) Third is the question of *consequence*: What would be the effects of adhering to the values—for one's concept of oneself, for one's behavior, for one's relationships with others and society, and to the process of the rhetorical transaction?
4) Fourth is the question of *consistency*: Are the values confirmed or validated in one's personal experience, in the lives or statements of others whom one admires and respects, and in a conception of the best audience that one can conceive?
5) Fifth is the question of *transcendent issue*: Even if a prima facie case exists or a burden of proof has been established, are the values the message offers those that, in the esti-

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80. *Id.* at 108.
81. *Id.*

> mation of the critic, constitute the ideal basis for human conduct?[82]

These "criterial questions" can be used in addition to those of "the logic of reasons," they can be "infused with" standards for formal and informal reasoning, or they can be applied within and along with Toulmin's model of argument.[83] Fisher sees such traditional forms of analyzing reasoning as retaining validity, but sees them as part of a broader assessment of rationality—not as the sole or privileged means of assessment.[84]

In the narrative paradigm, formal and informal logic remain essential to understanding human communication.[85] But, the logic of good reasons supplements these once-privileged logics.[86] This supplementation is necessary because, although traditional logics reflect persons' enactments of formally taught reasoning processes, narrative logics provide a broader understanding because stories, unlike traditional reasoning, engage the "whole mind in concert with itself."[87] Also, unlike traditional reasoning, narrative logic is learned in socialization, not in formal education.[88]

In addition to downplaying the importance of formally learned reasoning processes, narrative rationality emphasizes the role of values in human affairs, because "*humans as rhetorical beings are as much valuing as reasoning animals.*"[89] Traditional logics have discounted values, and Fisher wants to reverse this.[90]

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82. *Id.* at 109.

83. *Id.* at 110. Toulmin's model of argument is explicated in STEPHEN E. TOULMIN, THE USES OF ARGUMENT (1958), and discussed in COMMUNICATION AS NARRATION, *supra* note 37, at 110-14.

84. COMMUNICATION AS NARRATION, *supra* note 37, at 48, 88.

85. Not all scholars agree that narrative rationality is consistent with traditional rationality. Lewis thinks narrative and traditional logic "can be distinctive and incommensurable." William F. Lewis, *Telling America's Story: Narrative Form and the Reagan Presidency*, 73 Q.J. SPEECH 280, 297 (1987).

86. Arnold, *supra* note 42, at x.

87. COMMUNICATION AS NARRATION, *supra* note 37, at 68.

88. Craig W. Cutbirth & Sandra M. Metts, The Conversational Bases of Narrative Rationality: An Extension of Fisher's Narrative Paradigm, 4 (Nov. 8, 1985) (unpublished manuscript available from author) (citing Fisher, *Moral Argument*, *supra* note 68, at 8).

89. COMMUNICATION AS NARRATION, *supra* note 37, at 57.

90. Fisher has argued that "the role of values in the constitution of knowledge, truth, or reality has been generally denied"; that "in serious matters . . . technical discourse has been assigned almost unquestioned superiority over rhetorical and poetic discourse"; that "the reasons for this assignment of superiority deserve to be questioned severely"; and that "values function in constituting all that we consider knowledge." *Id.* at xi.

Fisher denounces any implication that his emphasis on values and his devaluation of traditional logics reflect an assumption that people are incapable of rational decisions. Instead, he advocates a broader conception of rationality that respects persons' rationality. "Narration implies, however, that the 'people' judge the stories that are told for and about them and that they have a rational capacity to make such judgments."[91] This view of rationality is egalitarian and is inimical to "[t]he sort of hierarchy" created by assuming "that some people are qualified to be rational and others are not" because it "assigns basic rationality to all persons not mentally disabled."[92] Both senders and receivers of messages are persons capable of reason.

D. The Rational World Paradigm

As has been implicit throughout the foregoing description of the narrative paradigm, Fisher constructed the paradigm as a response to the dominance of the prevailing rational world paradigm, which has "been in existence since Aristotle's *Organon* became foundational to Western thought about reasoning."[93] In all of its various forms, the rational world paradigm holds that:

1) [H]umans are essentially rational beings;
2) the paradigmatic mode of human decision making and communications is argument—discourse that features clear-cut inferential or implicative structures;
3) the conduct of argument is ruled by the dictates of situations—legal, scientific, legislative, public, and so on;
4) rationality is determined by subject-matter knowledge, argumentative ability, and skill in employing the rules of advocacy in given fields; and
5) the world is a set of logical puzzles that can be solved through appropriate analysis and application of reason conceived as an argumentative construct. In short, argument . . . is the means of being human, the agency of all that humans can know.[94]

These assumptions give rise to the "logic of reasons" by which discourse, including legal discourse, has traditionally been assessed.[95] The logic of reasons is related to another important aspect of the

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91. *Id.* at 67.
92. *Id.*
93. *Id.* at 59.
94. *Id.* at 59-60.
95. *See supra*, text accompanying note 80.

rational world paradigm. "The rational-world paradigm implies that rationality is a matter of argumentative competence: knowledge of issues, modes of reasoning, appropriate tests, and rules of advocacy in given fields."[96] The dominance of the rational world paradigm and its logic of reasons is evidenced by the fact that part of "the historic mission of education in the West has been to . . . instruct citizens in at least the rudiments of logic and rhetoric."[97] The rational world paradigm "places a premium on formal laws or structures of thought and relies on education as the means of learning the rules of logic and reasoning."[98]

As discussed above, Fisher attempts to subsume elements of the rational world paradigm, including use of principles of logic and reasoning when appropriate.[99] He does not reject the paradigm; he rejects some aspects of the paradigm. One of those rejected aspects is the pretension that it has a monopoly on truth.

> The presumption is that narrative has more to do with hiding sins than with revealing truths . . . Ideologists of science claim a monopoly on truth, and they reject without qualification anything that acquiesces to the status of fiction or fails to distinguish storytelling within or about science from telling stories when caught with a hand in the cookie jar.[100]

The rational world paradigm believes it has a monopoly on truth because it believes in objective inquiry and reason as the means for discovering truth. This mirrors modern science. "[T]he commitment that makes Western philosophy into modern science is the prejudice that 'Nature' is the ultimate arbiter of all 'facts'—that human understanding is a Mirror of Nature. As Herbert Marcuse contended, this is a commitment to: Reason = Truth = Reality."[101]

The dominant rational world paradigm reflects a positivist ontology and epistemology. Positivism asserts an actual object world with laws that can be certainly known by persons applying proper methods of inquiry. Believers in the rational world paradigm "see an objective world that speakers can mirror in their communication and against which its logic and argument can be tested and evaluated."[102]

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96. COMMUNICATION AS NARRATION, *supra* note 37, at 66.
97. *Id.* at 60.
98. Cutbirth & Metts, *supra* note 88, at 1.
99. *See* note 85 *supra*.
100. McGee & Nelson, *supra* note 45, at 144.
101. *Id.* at 147 (citing HERBERT MARCUSE, ONE-DIMENSIONAL MAN 123 (1964)).
102. Bormann, *supra* note 9, at 135.

The rational world paradigm is not new and did not gain dominance overnight. Fisher devotes a great deal of space in his book to explicating the historical genesis, evolution, and continued dominance of the rational world paradigm.[103] Before the Pre-Socratics, Plato, and Aristotle, no form of discourse was privileged for a unique connection to truth.[104] Socrates' student, Plato, and Plato's student, Aristotle, were influential proponents of the idea that "some forms of discourse are superior to others" by virtue of their "relationship to true knowledge."[105] This idea remained popular until the time of Descartes, and the "eventual result of Descartes's views was the doctrine of the logical positivists, who held that no statement could claim expression of knowledge unless it was empirically verifiable—at least in principle or it involved a logical entailment."[106]

While the positivists have been dominant in many areas of inquiry and society, their dominance is not unquestioned. In fact, Fisher identifies "much ferment about the consequences of these views," lists some of the most prominent contemporary thinkers who have attacked positivism, and offers the narrative paradigm as a remedy to the deficiencies of positivism.[107]

Positivists and other adherents to the rational world paradigm fail to account for human values. In positivism, values—because they are not empirically verifiable—are literally "non-sense."[108]

Another disturbing aspect of both the rational world paradigm and positivism is that they privilege some forms of discourse, and discount others. To the ancient Greeks, the word "*logos*" had many meanings, the central one referring to serious rational discourse. As Fisher tells the story, the development of the rational world paradigm, from the time of Aristotle, is a story of the privileging of philosophical discourse and the technical discourse of subject-matter experts over rhetorical and poetic discourse. Fisher says that *logos* ("serious, rational discourse") had, "by the twentieth century come to be thought of as occurring primarily in philosophical and technical discourse. Rhetoric and poetic were widely thought of as vacuous or irrational modes of communication."[109] This twentieth century state of affairs in which logic and rhetoric have been separated is attributable to the ascendance

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103. COMMUNICATION AS NARRATION, *supra* note 37, at 5-22.

104. *Id.* at 6.

105. *Id.* at 7.

106. *Id.* at 8-9.

107. *Id.* at 9 (the philosophers he lists are Richard Bernstein, George-Hans Gadamer, Jurgen Habermas, Richard Rorty, and Calvin Schrag).

108. *Id.* at 9, 34.

109. *Id.* at 24.

of "positivism and mathematical (symbolic) logic" and to the attendant relegation of metaphysics to the status of "idle speculation" and of values to the status of "emotive 'non-sense.'"[110]

Legal discourse that does involve strict deductive application of legal principles to facts determined by a finder of fact often falls into that category of rhetorical discourse which the rational world paradigm is bound by its principles to reject. Much trial-related discourse—particularly opening and closing statements—and much appellate discourse—particularly briefs and opinions—is openly rhetorical. Since legal discourse, like other rhetorical discourse, "is replete with what Chaïm Perelman called 'confused notions,' such as wisdom, justice, honor, the true and good, it obviously cannot be taken as a serious intellectual activity within a positivist framework."[111]

The positivist rejection of values, emotions, and the rhetorical use of such "confused notions" as justice, honor, and the true and the good, are not consistent with human nature. Rhetorical scholars have long acknowledged that such variables play an important role in legal decisions, perhaps a more important role than the rational-world logic of the law. Rhetoricians have rarely found controversial Cicero's statement that "men decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute."[112]

Because of its rejection of values, emotions, and rhetorical appeals, the rational world paradigm's view of rationality is much narrower than the value-oriented narrative rationality. While narrativists recognize traditional logics and reasoning as part of the narratives people share, rationalists do not reciprocate. The rational world paradigm holds that "unless one deduces a conclusion from recognizable premises or infers a claim from particulars, one presumably does not argue."[113]

The rational world paradigm's privileging of formal logic and reasoning skills to the exclusion of other skills would not be problematic if such skills were sufficient to account for human behavior and to provide sound guidance in ethical decisions. However, the privileged reasoning skills do not provide either. Studies in argumentation conducted by many of the notables of that field have demonstrated that

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110. *Id.* at 34.

111. *Id.* (quoting CHAIM PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 132 (John Wilkinson & Purcell Weaver trans., 1969)).

112. COMMUNICATION AS NARRATION, *supra* note 37, at 37 (quoting CICERO, DE ORATORE 2.4.178 (E.W. Sutton trans., Harvard University Press, 1949)).

113. COMMUNICATION AS NARRATION, *supra* note 37, at 158.

"principles of formal logic inadequately explain informal rationality and human valuing."[114]

The inherent inadequacy of formal logic to account for human decision making or to guide ethical choice is revealed in a simple analysis of the following textbook syllogism:

> All men are mortal.
> Socrates is a man.
> Therefore, Socrates is mortal.

The syllogism "begins by asserting a truth . . . then applies a particular instance . . . and concludes with what is obvious from the outset."[115] The problem with this model of logic is that properly formed syllogisms "yield only consistent statements. Put another way: the syllogism is a verbal maneuver the terms of which have no necessary connection with real things."[116]

Despite the inadequacies of the logical model favored by adherents to the rational-world paradigm, its adherents claim a monopoly on truth because they rely upon favored methods of discovering truth. Delgado has argued that legal scholars are among the rational world adherents who claim a monopoly on truth. "Traditional legal writing purports to be neutral and dispassionately analytical, but often it is not," at least partially because "legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions."[117] The problem with this "supposedly objective point of view" is that it "often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints," while "[i]mplying that objective, correct answers can be given to legal questions" and thus "obscur[ing] the moral and political value judgments that lie at the heart of any legal inquiry."[118]

In opposition to the positivist model and its pretensions to a monopoly on truth, the narrative paradigm equalizes all forms of communication, by concluding that all communication contains "ideas that cannot be verified or proved in any absolute way."[119] Fisher does

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114. Arnold, *supra* note 42, at ix (listing Stephen Toulmin, Chaïm Perelman, Douglas Ehninger, and Wayne Brockriede as those whose studies have established this premise).

115. COMMUNICATION AS NARRATION, *supra* note 37, at 32.

116. *Id.* at 33.

117. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440 (1989).

118. *Id.*

119. COMMUNICATION AS NARRATION, *supra* note 37, at 19.

not deny that "some discourse is more veracious, reliable, and trustworthy in respect to knowledge, truth, and reality than some other discourse," but at the same time contends that "no form or genre has final claim to these virtues."[120]

The adherence of legal scholars' to the rational world paradigm is ironic in the face of other fields' moves away from positivism.[121] A full discussion of the various sciences' rejection of positivism is well beyond the scope of this Note. However, some very important thinkers' ideas have since become an important part of post-positivist thinking about human behavior.[122]

Legal scholars' adherence to positivism is even more ironic in light of the attempts of modern argumentation scholars' to replace formal logics based on mathematics with more workable models of reasoning based on jurisprudential models.

> In both works [Stephen Toulmin's *The Uses of Argument* and Chaïm Perelman & L. Olbrechts-Tyteca's *The New Rhetoric: A Theory of Argumentation*], the geometric model of reasoning was replaced by a jurisprudential model. Toulmin wrote: "Logic (we may say) is generalized jurisprudence. Arguments can be compared with law-suits, and the claims we can make and argue for in extra-legal contexts with claims made in the courts, while the cases we present in making good each kind of claim can be compared with each other." And Perelman wrote: "*law plays a role in regard to argumentation analogous to that of mathematics in regard to formal logic.*"[123]

In recognizing the centrality of narrative to communication, rhetoric, and legal discourse, legal scholars are rediscovering what was known to classical rhetorical scholars. In Cicero and Quintilian's time, educated Romans were taught that an essential part of any oratory—

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120. *Id.* at 19.

121. "The equation between impartiality, objectivity and distance, on the one hand, and 'facts' or 'truth' on the other, has come to be questioned in virtually every area of intellectual life." Baron, *The Many Promises*, *supra* note 3, at 82.

122. "The investigations of Kurt Godel and Werner Heisenberg made it clear that even scientific thinking is not carried out entirely within the confines of formal systems. Formal logic was found by an early true believer, Ludwig Wittgenstein, in his later writings, to be irreducibly limited in providing an account of what actually goes on in ordinary discourse and action. It was superseded by the jurisprudentially grounded informal logics proposed by . . . Toulmin and Perelman. And it was opposed by existentialism and hermeneutics." COMMUNICATION AS NARRATION, *supra* note 37, at 35.

123. *Id.* at 44 (footnotes omitted) (quoting STEPHEN TOULMIN, THE USES OF ARGUMENT 7 (1958); and Chaïm Perelman, *The New Rhetoric and the Rhetoricians: Remembrances and Comments*, 70 Q.J. SPEECH 195 (1984)).

forensic or otherwise—was the *narratio*. The significance of the *narratio* is lost on those who adhere to the rational world paradigm because the subjective, personal nature of the classical *narratio* is not translatable into logical-positivist language and thinking. McGee & Nelson note that "[w]hen you go to court, you tell a story (*narratio*) that you purport to be true," and telling this story often is referred to as "mak[ing] a statement."[124] Perceiving such stories as statements is important because a statement "is also a proposition, a declarative sentence about a state of affairs: it asserts an objective, even absolute reality [and] . . . particularly in climates of scientism, statements are supposed to 'mirror nature,' and the 'truth' of statements depends on their correspondence with 'the facts,' and is 'independent of their representation in any story.'"[125] Thus, viewing stories as statements transforms the stories into something altogether different. And, while Quintilian understood that facts "are not independent of the story that structures them," the dominance of the rational world paradigm indicates that contemporary legal society, with its emphasis on statements rather than stories, reflects a culture that believes it discovers truth rather than makes truth.[126]

A narrativist would look to the stories in forensic statements and in the *narratio*. A rationalist would look for the statement in the *narratio*, and dismiss as nonsense anything but statements that can be analyzed for their accuracy in mirroring the world.

E. Summary

The growing popularity of narrative approaches to legal communication mirrors the popularity of Fisher's narrative paradigm in the communication field. Fisher's approach is attractive to communication scholars because of its generality, its synthesis of communicative forms and human nature, its adoption of the view that reality is symbolically constructed, and its emphasis on values. Fisher assumes that humans are best conceptualized as the story telling animal, that good reasons, which are affected by history, biography, culture and character, are the paradigmatic mode of human decision making and communication, that rationality is narratively defined, and that the world we know is a series of stories from which we must choose.

Consistent with those assumptions, Fisher rejects the positivism of the reigning rational world paradigm. Fisher is concerned with good reasons as a guide to human ethical choices, and rejects the rational

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124. McGee & Nelson, *supra* note 45, at 148.
125. *Id.*
126. *Id.*

world paradigm's focus on using formal reasoning to find truth in the logical puzzles which constitute the world.

IV. Law, Legal Ethics, and the Rational World Paradigm

The major contention of this section is that law and legal ethics, on the whole, reflect the assumptions of the rational world paradigm. This is important, because any attempt to analyze legal ethics from a narrative perspective is influenced by the realization that the current rules of ethics reflect competing philosophical and theoretical assumptions.

A. The Rational World Paradigm Dominates Law

Discovering that legal scholars, teachers and practitioners are positivists who subscribe to the dominant rational world paradigm would hardly be a surprise because of the dominance of that paradigm. "Most people, when pressed, subscribe to what might be called the objectivist theory of truth. The objectivist theory of truth holds that there is a single neutral description of each event which has a privileged position over all other accounts."[127] Objectivism is consistent with the rational world paradigm.

The law reflects the dominance of positivism and of the rational world paradigm. "In the United States, Christopher Columbus Langdell's understanding of law as a science has so far proven impossible to eject from the legal academy and the practitioners' mind-set."[128] The legal community asks judges to aspire to "[i]mpartiality, independence, disengagement [and] lack of bias" because the rational world paradigm is suspicious of "the personal and emotional" and, in "pursuit of this goal, law students are taught to give 'reasons,' not 'opinions.'"[129]

The dominance of the rational world paradigm is perpetuated as law students are exposed to this same world view. Papke believes a major reason the law has been slow to acknowledge the importance of legal narratives is that legal education is "imbued with lingering commitments to a post-enlightenment scientific paradigm and directed by positivist presumptions."[130] Law school teaching often reflects positivism as students are repeatedly asked to "articulate a 'right' answer. Students continually provide one, only to have it undermined and replaced by another. Yet, the quest remains: find the 'true' answer."[131]

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127. Scheppele, *supra* note 21, at 2088-89 (footnotes omitted).
128. Narrative and the Legal Discourse, *supra* note 2, at 2.
129. Baron, *The Many Promises*, *supra* note 3, at 82.
130. Narrative and the Legal Discourse, *supra* note 2, at 8.
131. Matasar, *supra* note 16, at 976.

If legal education is imbued with rationalism, we should not be surprised that legal scholarship is, as well. As Papke has complained, "Too much legal scholarship . . . merely gathers large numbers of opinions together, assuming with positivist doggedness that 'the law' will emerge from the crowd."[132] Jackson argues that legal scholars have traditionally accounted for legal decisions by focusing on the adjudicatory syllogism, which they have "conceived as a deductive process [in which] a general rule (major premise) is applied to the facts of the case (minor premise), these facts having been established as an instance of the facts mentioned in the general rule (or 'subsumed' within it), with the result that the conclusion necessarily follows."[133] This preoccupation with deduction and "facts" is classical rational world thinking.

With education and scholarship dominated by positivism, it is inevitable that legal practice is similarly dominated. The rational world paradigm's explanation of the practice of law as a truth-finding process was summarized by Scheppele as follows:

> If one task of the law is to find truth then, on the objectivist account, the task of the law is to locate this privileged description, the one that enables the audience to tell what *really* happened as opposed to what those involved *thought* happened. Truth can be found by removing the self-serving accounts of those who stand to gain . . . [by] being partial. Truth, in this view, is what remains when all the bias, all the partiality, all the 'point-of-viewness' is taken out and one is left with an objective account free of the special claims of those who stand to gain. And though legal advocates may emphasize partial versions, judges or juries are thought to be able to sort through those partial accounts to find the bits that are 'really true.'[134]

Officials of the American Bar Association have articulated the same perception that the trial is a search for truth. A formal opinion issued by the Committee on Professional Ethics and Grievances spoke of perjury in terms suggesting that it is banned because it contaminates the truth-seeking of trials. "*Canon 29* is based upon sound public policy which singles out perjury because perjury strikes at the roots

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132. David Ray Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, in NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 206 (David R. Papke ed., 1991).

133. JACKSON, *supra* note 20, at 37.

134. Scheppele, *supra* note 21, at 2089-90 (footnotes omitted).

of our American system of jurisprudence. Perjured testimony poisons the well-springs and makes a mockery of justice."[135]

Schwartz's account of the reasoning of the Supreme Court in *Nix v. Whiteside*[136] indicates that the objectivist view dominated the Supreme Court as it considered the conflict between a defense attorney's compliance with ethical obligations and a client's right to effective assistance of counsel. Schwartz noted:

> Whatever the limitations and disagreements, all members of the Court expressed the view that the reason for the prohibition of perjury is that it undermines the principal objective of the trial: the determination of truth. The majority was explicit about 'the very nature of a trial as a search for truth' and 'the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, [being] essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury . . . .' The concurring Justices agreed: 'All perjured relevant testimony is at war with justice since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.'[137]

Some evidence, then, shows that the legal community generally, legal scholars, legal educators, and legal practitioners share the rational world paradigm.

Unfortunately, law is not good positivism. That is, even if the tenets of logical positivism are valid, legal processes are not well suited to discovering truth. As but one example of legal processes which preclude the discovery of truth, Schwartz discusses the rules of evidence. "It is a commonplace that evidentiary privileges and exclusionary rules can and do keep truthful, probative evidence from the trier of fact."[138] No method that omits such evidence can make a serious or credible claim to seeking or finding "truth"—at least not by the objectivist

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135. ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (Brucker & White, dissenting).

136. 475 U.S. 157 (1986).

137. Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 Sw. L.J. 1135, 1138 (1988) (quoting Nix v. Whiteside, 475 U.S. 157 (1986)). The *Nix* court also referred to the trial as "a search for truth," 475 U.S. at 173, while the concurring opinion concluded that "the proposition that presenting false evidence could contribute to . . . the *reliability* of a criminal trial is simply untenable," Nix v. Whiteside, 475 U.S. at 185 (Blackmun, J., concurring) (emphasis added).

138. *Id.* at 1139.

account. Harold See, who offers a different account of the truth-finding account of the law,[139] asserts that it is "misleading to suggest that truth is the objective of the adversary system," and that it is "a potentially serious misperception to believe that courts seek truth or that lawyers are engaged in helping the courts find truth."[140]

Even if legal processes were designed to discover the truth, legal scholars have failed to recognize that language and communication are not neutral instruments to convey the raw data from which truth is constructed, but are themselves instruments which introduce "bias," "subjectivity," and "perspective"—the enemies of objectivity.

> The physical or 'object' world enters the production of justice only at several steps removed from the terms on which judgments are ultimately based. In this fluid symbol system the real world and the symbolic representation of it in the courtroom are in tension. On the one hand, courtroom stories must be built on definitions of the material evidence that comes from the incident in question. In this sense "the facts" do exercise some constraint over the possible stories that can emerge in a case. However, the constraint is considerably less binding than the conventional mythology of justice shared by most legal professionals and ordinary citizens would indicate.[141]

Hence, until legal scholars can account for the role of symbol use in trials, the trial's usefulness as an instrument for discovering truth cannot be seriously discussed. Expressing the prevailing epistemological view of communication scholars, Gill says that "the outcome of a trial . . . can be only probable truth."[142]

B. The Narrative Account of Trials

The prevailing view within the law is that judges and juries should aspire to objectivity so they can make unbiased decisions about what "really happened" and what law should be applied. The narrative approach to legal studies "offers a different vision of . . . legal decisionmaking. In this vision, the goal is not 'objectivity.' Rather, it is consciousness of the multiplicity of accounts—all in their way true,

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139. See argues that courts are operated so as to produce results that would approximate "truth" (defined as the results an omniscient society would obtain for the same case). This view is not consistent with the narrative approach. Harold See, *An Essay on Legal Ethics and the Search for Truth*, 3 GEO. J. LEGAL ETHICS 323-26, 331 (1989).

140. *Id.* at 324, 331.

141. RECONSTRUCTING REALITY, *supra* note 22, at 143-44.

142. Gill, *supra* note 26, at 703.

all inevitably partial—that compete for attention and belief."[143]

The narrative approach defines "truth" as inherently subjective; that it is all the more true because it is "partial, engaged, biased and felt."[144] Thus, narrativism holds that courts do not seek truth. Instead, courts decide which stories to accept and reject. Courts do not make these selections by determining which stories reflect "truth." Scheppele gave this account:

> Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events. In law, the adoption of some stories rather than others, the acceptance of some accounts as fact and others as falsehood, cannot *ever* be the result of matching evidence against the real world to figure out which story is true. Despite the popularity of correspondence theories of language, courts *cannot* do what would be necessary to determine whether words corresponded to things and hence were being used properly. . . . Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about the events. And when litigants come to court with different stories, some are accepted and become 'the facts of the case' and others are rejected and cast aside. Some of what is cast aside may indeed be false (and some of what is accepted may be too). But some of the rejected stories may be accurate versions of events that grow from experiences different from the experiences of those who are doing the choosing.[145]

Thus, courts do not always choose between a true and a false story. In fact, "stories that lead to very different legal conclusions can be different plausible and accurate versions of the same event."[146] In choosing among stories, "the choice is not between 'fact' and 'fiction,' or between 'objectivity' and 'subjectivity.' *Someone's* story will emerge in legal decisions; the only question is whose."[147]

The opposing accounts of the purpose and nature of trials and stories offered by the dominant rational world legal community and by legal narrativists are essential. The fundamental differences in perspective provided by the rational world and narrative paradigms suggest

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143. *The Many Promises*, *supra* note 3, at 104.
144. *Id.* at 85.
145. Scheppele, *supra* note 21, at 2082 (footnotes omitted).
146. *Id.* at 2097.
147. *The Many Promises*, *supra* note 3, at 85.

that ethical principles consistent with one paradigm will not be consistent with the other. Because the rational world paradigm is reflected in many of the Model Rules of Professional Conduct,[148] a paradigm shift in the law from the rational world to the narrative paradigm would necessitate a reconsideration of ethical principles.

The remainder of this Note examines current ethical rules, analyzes these rules from the narrative perspective, and suggests changes in the rules that would be necessitated by widespread adoption of the narrative view.

V. The Model Rules From a Narrative Perspective

A scholar interested in examining ethics from a narrative perspective has many choices. For example, the scholar might examine the Model Rules of Professional Conduct ("Model Rules") as a narrative and attempt to reveal the story they tell about lawyers and their ethics. One might examine better ways to tell this story so as to improve the public image of lawyers or to encourage more ethical conduct among lawyers. One could examine the stories told about the Model Rules by scholars, practitioners, and students. In addition, one could look at the stories told by the published opinions of lawyer disciplinary authorities. Finally, one could look at stories and narratives as ways of inculcating legal practitioners with a more personal and humanistic sense of ethical conduct, as some legal scholars have begun to do.[149]

A. Introduction

A pressing question raised by the adoption of a narrative perspective on law and legal ethics is the compatibility between ethical guidelines

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148. Model Rules of Professional Conduct (1983).

149. Johnson calls traditional legal ethicists such as those who draft the legal ethics codes, those who write treatises on legal ethics, those who compile digests on legal ethics, and those who favor use of the MPRE, the "law-givers," and says they "view legal ethics as chiefly concerned with the identification, transmission, and enforcement of uniform standards governing the conduct of lawyers." Vincent Robert Johnson, *Law-givers, Story-tellers, and Dubin's Legal Heroes: The Emerging Dichotomy in Legal Ethics*, 3 Geo. J. Legal Ethics 341-43 (1989).

Johnson sees an opposing camp of legal ethicists, the "story-tellers," as a "dedicated circle of spiritually kindred academics" who place "a higher value on persons and context than on principles and procedures, and on the cultivation of a deeper, less mechanical sense of professionalism than detailed rules can provide." *Id.* at 343. The story-tellers "endeavor . . . to focus on the interpersonal, humanistic dimensions of law practice, and on the larger question of "What is just?" through the use of classroom simulations, videotapes which bring lawyers and clients into the classroom, and other, less traditional teaching techniques." *Id.* at 344-45 (footnotes omitted). While the story-tellers' efforts are consistent with a narrative approach and are to be encouraged, this Note takes a different approach.

and the understanding of legal practice provided by the narrative approach.[150] The Model Rules are the most popular ethical guidelines, so they make an excellent starting point.

However, an analysis of the Model Rules in their entirety is a weighty project unnecessary for the purposes of revealing the fundamental implications of adopting the narrative paradigm. The Model Rules attempt to regulate a great deal of attorney conduct, including: competence, goals of representation, diligence, fees, conflicts of interest, loyalty, confidentiality, business transactions, law firm organization, and provision of *pro bono* services. The rules governing these matters simply do not regulate communication *qua* communication, and thus are not directly implicated by the adoption of the narrative paradigm. The present Note examines only the Model Rules which directly regulate lawyers' communication.

This Note was inspired, in part, by Johannesen's attempt to produce a narrative ethics for political communication in place of the rational world ethics that have dominated that field.[151] Johannesen noted that two ethical analyses of the rhetoric of Ronald Reagan from the rational world perspective concluded that Reagan badly violated ethical standards,[152] yet Lewis' narrative analysis found Reagan's rhetoric far more ethical.[153]

The differing conclusions of these studies result from the different assumptions and ethical standards of the rational world and narrative paradigms. One important difference is that rational world ethics, consistent with its epistemological view that the truth about reality can be known through objective inquiry, requires ethical communicators to provide verifiable facts and sound reasoning to support their claims.[154] The narrative paradigm rejects positivism. "When narrative dominates, epistemological standards move away from empiricism."[155] Ethical narrative communicators must meet different standards. If the story being told "is not true, it must be true-to-life; if it did not actually happen, it must be evident that it could have happened or that, given the way things are, it should have happened."[156]

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150. A speech communication scholar has taken up the challenge of constructing a new set of narrative ethics for *political communication* to replace the rational world ethics which have dominated the field. *See* JOHANNESEN, *supra* note 11, at 253-63.

151. *Id.*

152. Ralph E. Dowling & Gabrielle Marraro, *Grenada and the Great Communicator: A Study in Democratic Ethics* 50 W.J. SPEECH COMM. 350 (1986); Richard L. Johannesen, *An Ethical Assessment of the Reagan Rhetoric: 1981-1982* in POLITICAL COMMUNICATION YEARBOOK 1984 226 (Keith R. Sanders et al. eds., 1985).

153. Lewis, *supra* note 85.

154. JOHANNESEN, *supra* note 11, at 255-56.

155. Lewis, *supra* note 85, at 288.

156. *Id.*

Thus, one important foundation of narrative ethics is the realization that "truth," in the sense of correspondence with an objective world, *cannot* be the goal of communication nor the ethical standard for the narratives offered by lawyers. "Judgments based on story construction are, in many important respects, unverifiable in terms of the reality of the situation that the story represents."[157]

Many scholars have recognized the impossibility of discovering a single, truthful, privileged description of even a single object or event. Legal narrativist Delgado noted that a single object "can be described in many ways," and gave the example of a red rectangular object on the floor which may be a nuisance if a toe is stubbed on it, a doorstop if so used, evidence of poor housekeeping, a child's toy, or just a brick left over from a project.[158] "There is no single true, or all-encompassing description" of objects because we "participate in creating what we see in the very act of describing it."[159] Litigation, of course, requires decisions about more than single objects or events. And, as Delgado noted, "[s]ocial and moral realities . . . are just as indeterminate and subject to interpretation as single objects or events, if not more so."[160]

The rational world paradigm's belief in the ability of legal decision makers to determine what "really happened" is a major difference between rational world and narrative ethics. It is important because many legal ethical standards are based on this assumption of the rational world paradigm.

One way in which the Model Rules reflect the rational world paradigm is their condemnation of deceit. "[L]egal codes and guidelines rule out deceit unequivocally."[161] Deceit is forbidden because it interferes with the positivist ideal of the purpose of litigation—discovering truth. The Supreme Court indicated, in *Nix v. Whiteside*,[162] that courts forbid deceit because it is inconsistent with the truth-finding function of trials.[163]

Thus, the Model Rules which forbid deceit, to the extent they are based on the belief that deceit interferes with truth-finding in litigation and bar admissions and discipline, are based on rational world rather than narrative assumptions.[164] Making these rules consistent with the

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157. RECONSTRUCTING REALITY, *supra* note 22, at 33.
158. Delgado, *supra* note 117, at 2416.
159. *Id.*
160. *Id.*
161. Bok, *supra* note 13, at 923.
162. 475 U.S. at 157.
163. *See* note 136 *supra.*
164. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3(a)(1), 3.3(a)(4), 3.3(c)-(d), 3.4(b), 4.1(a), 8.1(a), 8.2(a) (1983).

narrative paradigm would require that they be modified to reflect the narrative assumptions that "truth" is relative, subjective, and conditional. A narrative ethic would require, consistent with its epistemology, that stories, if not true, must be "true-to-life" and that if a narrated event did not "actually happen, it must be evident that it could have happened or that, given the way things are, it should have happened."[165]

Other rules require the lawyer to disclose facts and legal authority contrary to their clients' interests.[166] These, too, reflect the rational world paradigm's belief that full and accurate presentation of relevant "facts" is essential to discovering the truth, and that legal procedures seek to discover truth.

B. The Nature of Narrative Ethics

Before analyzing the Model Rules, a discussion of the general nature of narrative ethics is in order. We know that narrative ethics would not reflect the positivist views that "true facts" can be known and can lead to accurate decisions about what really happened. But, narrative ethics vary from rational world ethics in other ways.

Although Fisher argues that the standards of good evidence and reasoning from the rational world paradigm are subsumed within the narrative paradigm, Lewis argues persuasively that the latter are inconsistent with the narrative nature of communication, and thus unavailable for use as ethical guidelines in narrative analyses.[167] Lewis believes narratives should be analyzed for internal consistency and coherence, the implicit and explicit morals and values they promote, and their consistency with "common sense."[168]

Farrell suggests that a narrative ethic of public discourse would involve answers to the following questions:

1) What public character is implied by the course we have taken?
2) What forms of social learning are yet available to us?
3) What legacy of experience do we wish our story to yield to future generations?
4) Which episodes in our unfinished and unbounded narrative of collective action are irretrievable or lost?
5) Which [episodes] need to be ended altogether, which prolonged, which begun anew?

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165. *See* note 85 *supra*.

166. MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3(a)(2)-(3), 3.3(d), 3.4(f), 4.1(b), 8.1(b) (1983).

167. *See* Lewis, *supra* note 85, at 280.

168. *Id.* (discussed in JOHANNESEN, *supra* note 11, at 258-59).

6) Which audiences, thus far neglected, need to have their own stories articulated?[169]

A narrative ethic cannot, then, be based on a preference for efficacious means of discovering truth. A narrative ethic must emphasize values. A narrative ethic would be concerned with the coherence and consistency of a narrative as a guide to action, the morals and values supported by a narrative, the consistency of a narrative with common sense, the effect of a narrative on the public, the effect of a narrative on future generations, the interaction of a narrative with past and future narratives of collective action, and the extent to which a narrative gives voice to the voiceless. These are the concerns which must illumine a narrative ethical analysis.

C. Analysis of Selected Rules

The Model Rules examined in this Note are a "mixed bag." Some of the Rules are, or can be interpreted to be, consistent with the narrative paradigm. Others are consistent in part and inconsistent in part. Still others are completely inconsistent with the narrative paradigm and would need to be abandoned in a world governed by a narrative view of the law. The present analysis begins with the rules most consistent with the narrative paradigm, before moving on to the rules inconsistent with narrativism.

1. Model Rules Consistent With the Narrative Paradigm.—Rules 1.2, 6.1 and 6.2 are welcome ethical standards to narrativists, many of whom believe that encouraging the telling of more and different stories by more persons is one of the benefits that will flow from recognition of the role of narratives in law.[170] Independently, because theory and research have suggested that storytelling ability and communication skills affect trial outcomes,[171] these rules would be welcomed by narrativists because representation by a skilled legal storyteller[172] would be recognized as essential in assisting marginalized persons so that the wheels of justice do not run over the marginalized persons

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169. Thomas B. Farrell, *Narrative in Natural Discourse: On Conversation and Rhetoric*, 35 J. Comm. 109 (1985).

170. *See, e.g.*, Delgado, *supra* note 117, at 2437-41; Farrell, *supra* note 168, *passim*.

171. *See* notes 27-35 *supra* and accompanying text.

172. In a post-rationalist narrative legal world, all competent lawyers presumably would be trained in the skills of storytelling. In a narrative world, lack of storytelling skills would be the very essence of lack of competence.

whose storytelling skills probably are in the greatest need of assistance from a trained storyteller.[173]

Rule 1.2 of the Model Rules decrees: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[174] To the extent that this rule tries to remove the stigma attached to representing marginal elements of society, it is consistent with the desire of many narrativists to provide a voice for the voiceless. While not arguing that the rule actually serves to encourage such representation, narrative scholars would embrace the rule for attempting to ensure that the stories of the voiceless are told before legal decisions are made.[175] The "voiceless" includes the poor, the apparently guilty, the politically marginal, ethnic and cultural minorities, and others for whom legal representation and fair public hearings are difficult to obtain.

Narrativists would also embrace ules 6.1 and 6.2 as ethical standards because those rules encourage lawyers to provide public service. Rule 6.1 encourages *pro bono* legal services by asserting that a lawyer "should render public interest legal service" by providing (1) "professional services at no fee or a reduced fee" to the poor or to charities, (2) "service in activities for improving the law, the legal system or the legal profession," and (3) "financial support for organizations that provide legal services" to the poor.[176] The first and third of these recommended activities serve to provide legal services to assure that marginal and disenfranchised persons' stories have a chance to be heard. Thus, this rule is consistent with a narrative ethic.

Rule 6.2 forbids attorneys from "seek[ing] to avoid appointment by a tribunal to represent a person except for good cause."[177] Because this rule assists courts in forcing attorneys to represent the same marginalized persons whose representation is encouraged by Rules and 1.2 and 6.1, narrative scholars would also embrace this rule as a standard of ethics.

Rule 2.1 would be a welcome part of a narrative ethic, but for different reasons than the previously discussed rules and for different reasons than made it part of the Model Rules. Rule 2.1 says that a

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173. Basil Bernstein has established that those occupying the lower socioeconomic classes have different and—by majority standards—inferior communication skills. *See, e.g.*, BASIL BERNSTEIN, CLASS, CODES AND CONTROL (1971).

174. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1983).

175. Many proponents of narrative legal studies believe narrative can be a powerful tool for the voiceless and disenfranchised members of society. *See, e.g.*, note 5 *supra*.

176. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

177. *Id.* Rule 6.2.

lawyer, "[i]n rendering advice . . . may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[178] This rule encourages lawyers to look beyond the narrow perspective and guidelines provided by "the law" and to base their advice to clients on additional considerations.

Legal advice based strictly on legal considerations—such as likelihood of prevailing on the merits in a lawsuit or prosecution—tells only part of the story. And, unless the law is a perfect reflection of social values, it omits any consideration of values. Narrativists believe in telling fuller stories and in using stories to convey social values. Thus, omission of "the rest of the story" and of social values from legal advice makes that advice incomplete. And, since clients lack legal training, the partial story told by a lawyer who omits non-legal considerations cannot easily be understood and evaluated by the standards of narrative rationality which the clients have learned.

A narrative version of Rule 2.1 doubtless would add a consideration of values to the other factors lawyers should consider in giving advice, and might well mandate consideration of these other factors as a means of assuring client comprehension. And, a legally defensible position might require advancing a defense or claim which can only be supported by an ethically suspect narrative performance in subsequent legal proceedings. Ethical advice would require that lawyers attempt to avoid this possibility.

As was mentioned earlier in this section, one possibility available to the narrative critic is to examine the stories told by the Model Rules. Without elaborating this road not taken, Rules 1.2, 6.1 and 6.2 provide a simple example to illustrate. These rules tell lawyers, and citizens who read the Rules, that lawyers are not people who endorse the views or actions of their clients, but are playing a role assigned them by the legal system. These rules also tell a story of a legal community which takes seriously its obligations under the system by sacrificing time, money, peace of mind, and freedom to assure everyone of the right to counsel.

If this Note were emphasizing the stories told by the Model Rules, Rule 1.2 would also be consistent with narrativism, because it appears to recognize that a stock narrative operating in contemporary society is that an attorney's choice of clients represents an endorsement of the clients' activities.[179] Having recognized the prevalence of this stock

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178. *Id.* Rule 2.1.

179. The existence of such a stock narrative does not seem controversial. One recent example of the currency of this stock narrative can be found in the recent

narrative, Rule 1.2 provides a counter narrative in which representation is not endorsement. This narrative competes with the stock narrative for public acceptance.

2. Model Rules Inconsistent With the Narrative Paradigm.—Several of the Model Rules run afoul of the narrative paradigm because they make philosophical assumptions at odds with those of the narrative paradigm. The first set of inconsistent rules are those which forbid making false or misleading statements of law, fact, or both. Rules 3.3(a)(1), 4.1, and 8.1 forbid knowingly making false statements of material fact in various contexts.

Rule 3.3(a)(1) says a lawyer "shall not knowingly . . . make a false statement of material fact or law to a tribunal."[180] Rule 4.1 forbids making "a false statement of material fact or law to a third person" while representing a client.[181] Rule 8.1(a) forbids bar admission applicants and lawyers involved in admission or disciplinary matters from "knowingly mak[ing] a false statement of material fact."[182]

These rules clearly reflect the rational world paradigm in assuming the existence and knowability of things called "facts" and "law." Enforcement of this rule would require that tribunals be able to discern what a lawyer "really" knew, what the law and facts "really" were, and that the law or facts actually stated by the attorney failed to correspond to the actual law and facts.[183] The standards of narrative rationality—probability and fidelity—are not part of the rule.

Rule 3.3(a) introduces its many requirements with the words: "A lawyer shall not knowingly . . ."[184] The Model Rules say "knowingly" refers to "actual knowledge of the fact in question."[185] Thus, the requirements imposed by Rule 3.3(a) flow from the positivist assumption of the existence of "facts" which persons can actually "know" in some absolute sense. This is itself inconsistent with the narrative paradigm, which holds that "facts" are elements of stories and obtain

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campaign for attorney general in Indiana, in which the voters elected a candidate whose primary campaign tactic was attacking her opponent as a defender of drug dealers and drunk drivers. This strategy makes sense only in a society in which a prevailing stock narrative considers representation as a form of endorsement.

180. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1(a)(1) (1983).

181. *Id.* Rule 4.1.

182. *Id.* Rule 8.1(a).

183. The Rules acknowledge the limited truth-discerning ability of lawyers by "presuppos[ing] that disciplinary assessment of a lawyer's conduct will be made on the basis of facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon certain or incomplete evidence of the situation." *Id.* Scope 5.

184. *Id.* Rule 3.3(a).

185. *Id.* Terminology 5.

their significance and meaning from the context of the stories in which they are told. And, persons are not assumed to know or to be able to know "the truth" about facts or the law. Therefore, a narrative version of Rules 3.3(a)(1), 4.1 and 8.1 would require lawyers to advance only claims which can be supported by rational narratives. A tribunal determining compliance with this standard would not have the impossible task of determining the actual facts and the law and their correspondence with the stated facts and law.

A narrative ethical system could either require the lawyer to tell only legal and factual stories which a subsequent tribunal would find rational, or limit the lawyer to presenting stories which they themselves find rational at the time they presented the facts or law questioned as unethical. However, the dilemma of choosing an objective or subjective standard would be mooted by a standard which measured ethicality by the narrative rationality of the story told by the lawyer whose ethicality is challenged.

A potential problem with this standard is that lawyers would be allowed to present facts or law which they do not believe to be "true" or rational, so long as a trier of fact could be convinced that a rational story supports the statements. Since this would allow what most people would call lying, the values endorsed by this rule might be called into question. However, since narrativism acknowledges that truth is personal and subjective, this conduct may not be morally objectionable from a narrative perspective and thus the rule's allowing of this kind of conduct would be acceptable. However, in the absence of a wholesale public paradigm shift to narrativism, a rule allowing "lying" in this limited sense might tell an undesirable story about the honesty and integrity of the legal profession.[186]

Some of the other Model Rules require the lawyer to make legal or factual disclosures under certain circumstances. There are two sets of such rules. Rules 8.1(b), 3.3(d), and 3.3(a)(3) require disclosures under circumstances where such disclosure aids in discovering the "truth." Rules 3.3(a)(2) and 4.1(b) require disclosures only when necessary to avoid fraud. These two sets of rules require separate analysis.

Rule 8.1(b) forbids bar admission applicants and lawyers involved in admission or disciplinary matters from failing "to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail[ing] to respond to a lawful demand for [non-confidential] information from an admission or disciplinary authority."[187] Rule 3.3(d) requires that a lawyer in an *ex parte*

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186. The current rule tells a public story of moral lawyers subject to sanctions for the immoral conduct of lying.

187. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1(b) (1983).

proceeding "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."[188]

Rule 8.1(b) assists the Bar's attempts to enhance the credibility of its members and admission and disciplinary procedures. The requirements of rules 8.1(b) and 3.3(d) are inconsistent with the narrative paradigm in that both require disclosure of facts "known" to the lawyer. Given the objectivist and positivist assumptions dominant in law, these rules prohibit conduct based on the objectivist concept of what the lawyer actually "knows." The Model Rules themselves require such a reading by defining "knowingly" as referring to "actual knowledge of the fact in question."[189] Such knowledge is not consistent with narrativism. Additionally, these rules apparently assume that tribunals attempting to enforce these rules can determine what a person actually knew and what the facts and law actually were.

Rules 8.1(b) and 3.3(d) require disclosures, presumably in order to provide all the relevant raw materials from which "truth" can be distilled.[190] While this reflects the rational world view that a full presentation of the facts is necessary to discovering the truth, the rule itself is not inconsistent with narrativism. Narrativism is not opposed to full consideration of what is relevant to a case. Thus, narrative versions of Rules 8.1(b) and 3.3(d) would encourage lawyers to disclose all "facts" which their self-believed stories or the stories offered by adverse parties make relevant to the legal decision involved.

Rule 3.3(a)(3) is a bit different. It forbids a lawyer from knowingly failing "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[191] This rule is intimately tied to the positivist conception of the law as an existing and knowable entity. According to the comments, "[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."[192] Legal narrativist Jackson has rejected this "underlying concept" that law proceeds by establishing that the facts of a particular case bring the particular case

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188. *Id.* Rule 3.3(d).

189. *Id.* Terminology 5.

190. In discussing a state evidence rule, the California Supreme Court wrote that the rule was "predicated on common sense, and public policy" because the "purpose of a trial is to arrive at the true facts." Williamson v. Superior Court, 582 P.2d 126, 130, n. 2 (Cal. 1978) (quoting Breland v. Traylor Engineering & Mfg. Co., 126 P.2d 455, 461 (Cal.App. 1942)).

191. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1983).

192. *Id.* Rule 3.3 cmt. 3.

(minor premise) within the class of cases to which a given rule of law (major premise) applies.[193] The requirement for disclosure of controlling legal authority is premised on the assumptions that the controlling law can be known and that the law operates in the deductive syllogistic way narrativists deny.

A narrative ethic regarding disclosure of legal authority is difficult to foresee, since such an ethic could not be imposed on a legal system which still operates as if the law is little more than the mechanical application of given major premises to discovered minor premises to draw foregone conclusions. However, adoption of a narrative law would lead to attorneys presenting competing stories as to the best disposition of cases. Lawyers would be obliged by their duty of competence to present the most rational narrative on behalf of their clients. A duty to disclose controlling authority would make no sense in such a narrative legal system, where the lawyer's job would be to research, present and support the narrative which best supports the client's case.

Rules 3.3(a)(2) and 4.1(b) require disclosures when needed to prevent fraud. Rule 3.3(a)(2) forbids the lawyer from knowingly failing "to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."[194] Rule 4.1(b) requires an attorney, in the course of representing clients, "to disclose a [non-confidential] material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."[195]

These rules regulate communication, but only instrumentally in that they require disclosures to prevent crimes and fraud. These rules incorporate the rational world assumption that "material facts" are objectively knowable, and that lawyers' knowledge of these facts can be objectively discerned by disciplinary tribunals. Narrativists would, of course, condemn fraud. The narrative paradigm, however, would recast Rules 3.3(a)(2) and 4.1(b) for enforcement purposes in terms of whether the lawyer could tell a narratively rational story to explain any challenged failure to disclose.

Model Rules 3.3(a)(4), 3.4 and Rule 7.1 forbid or regulate lawyers offering evidence that is false or believed to be false, and making false or misleading statements about their services. These rules require separate analysis.

Rule 3.3(a)(4) forbids the lawyer knowingly offering "evidence that the lawyer knows to be false."[196] Similarly, Rule 3.4(b) provides, in

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193. JACKSON, *supra* note 20, at 37-39, 55, 58-59.
194. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3(a)(2) (1983).
195. *Id.* Rule 4.1(b).
196. *Id.* Rule 3.3(a)(4).

pertinent part, that a lawyer shall not "falsify evidence" or "counsel or assist a witness to testify falsely."[197]

These rules clearly adopt the objectivist view that an attorney can "know" evidence is false. The lawyer must be able to know what is true and be able to test evidence for correspondence with what is true in order to know it is false. The narrative paradigm rejects the idea that the lawyer can "know" that evidence is "false." Instead, it measures stories by their probability and coherence. A narrative ethic might require an attorney to present only probable and coherent stories on behalf of clients. This, however, would merely duplicate a requirement of competent and diligent representation,[198] and no rule in this regard would be needed.

However, because the narrative paradigm is concerned with the values implicitly and explicitly supported by the stories we tell, some limits on deception are needed. Since "truth" cannot be the basis of a narrative legal ethic, a narrative ethic might instead forbid lawyers from offering or creating "facts" and narratives which they do not find credible, or from counseling others to offer such materials.[199] This often would result in lawyers being unable to present evidence and stories which their clients want advanced and which might be rational enough to convince a jury or factfinder of the justness of the client's cause. This would produce a major conflict between lawyers' other ethical obligations and their duty of diligent representation.

The extent and frequency of such conflicts could be reduced by a rule along the lines of Rule 3.3(c), which merely says a lawyer "*may* refuse to offer evidence that the lawyer reasonably *believes* is false."[200] A narrative rule, however, could not measure reasonableness by rational world standards. A lawyer could refuse to offer evidence out of which sense cannot be made by any probable and coherent narrative offered by the client. Those asked to evaluate the appropriateness of the lawyer's refusal to offer evidence would only need to evaluate the narrative rationality of the story told by the client to justify punishing the lawyer for not offering the evidence.[201]

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197. *Id.* Rule 3.4(b).

198. *Id.*, Rules 1.1 and 1.3.

199. "One of the advantages of viewing humanity dramatistically is that we approach ethics without confronting "Truth" or knowledge as a major preemptive concern." Richard E. Crable, *Ethical Codes, Accountability, and Argumentation*, 64 Q.J. Speech 23, 25 (1978).

200. Model Rules of Professional Conduct Rule 3.3(c) (emphasis added).

201. By the narrative account, disciplinary fact-finders are always evaluating stories for their reasonableness, but are unaware of this because they are trained to act as if they are discovering the truth about what really happened. Thus, the change in evaluation

Rule 7.1 forbids a lawyer making any "false or misleading communication about the lawyer or the lawyer's services," and goes on to define false or misleading.[202] A narrative perspective would not condone chicanery in advertising legal services, but doubtless would define the offense differently, so a discussion of the definitions found in subsections (a)-(c) is needed.

Subsection (a) defines a communication as misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."[203] This definition is objectionable from a narrative perspective because it relies on the positivist assumptions that the "facts" and the "law" are objects which can be "known" and that statements about them can be found to be false by direct comparison. The narrative paradigm would prefer a rule forbidding making statements the lawyer does not believe are "true," or for which the lawyer cannot offer a narratively rational story.

Subsection (b) defines as false or misleading any communication that is "likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law."[204] The second part of this subsection forbids lawyers from claiming they will use means forbidden by the Model Rules or other law, and seems little more than part of the American Bar Association's attempt to tell a story in which lawyers act under the law and face punishment for any transgressions. Lawyers promising to violate the rules and law would undermine the credibility of this narrative.

The first part of subsection (b), however, is inconsistent with the narrative paradigm because it labels as misleading even narratively rational communications. The logic behind this premise can only be that potential consumers of legal services cannot rationally appraise accurate information. This is made manifest in the comments, which note that subsection (b) "would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."[205] If such narra-

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standards for disciplinary tribunals are more formal than real, but the fact-finders' awareness that they are evaluating stories rather than finding truth might at least make their findings consistent with the nature of human thought processes and thus easier to do well than a process which pretends to do what it cannot do.

202. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

203. *Id.* Rule 7.1(a).

204. *Id.* Rule 7.1(b).

205. *Id.* Rule 7.1, cmt.

tively and logically relevant information is seen as likely to create unjustified expectations by legal consumers, the Model Rules foresee potential legal consumers as irrational and incapable of evaluating the meaning of such relevant evidence.

Rule 7.1(c) defines as false or misleading any communication which "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."[206] The rational world requirement of factual substantiation is too narrow and privileges rational world standards of "truth." A narrative ethic would forbid lawyers from comparing their services with those of other lawyers unless the lawyer can offer a rational narrative justifying the comparison.

Model Rule 3.1 is very troublesome. That rule provides that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[207] The rule is troublesome because its standards of frivolousness and good faith incorporate a number of positivist assumptions rejected by the narrative paradigm.

The first of these assumptions is that "the law" is a singular entity which exists and can be known. The comments indicate that "the law . . . establishes the limits within which an advocate may proceed."[208] This comment ultimately grounds ethical conduct in what the lawyer "knows" about "the law," and is not consistent with the narrative assumption that knowledge is inherently subjective and personal.

The comments go on to note that an action, defense, or claim is frivolous "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring" another, or "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law."[209]

Judging a claim as frivolous if the client has primarily malicious motives for bringing it is objectionable to narrativism because it suggests a tribunal ultimately will be able to find the "truth" about the client's motives, and thus makes an epistemological assumption inconsistent with narrativism. While this may seem to be splitting hairs, a narrative ethic regarding the bringing of frivolous claims would have to ground the test of frivolousness in some conception of the ability of the client to present an acceptable story to convince a tribunal that their motives were not primarily malicious.

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206. *Id.* Rule 7.1(c).
207. *Id.* Rule 3.1.
208. *Id.* Rule 3.1 cmt. 1.
209. *Id.* cmt. 2.

Allowing the lawyer to bring claims for which they can offer good faith arguments might be less objectionable if "good faith" were defined as an argument self-believed by the attorney to represent a rational story. Defining good faith as what a *reasonable lawyer* would believe to be a reasonable argument to extend, modify, or reverse existing law is objectionable for two reasons. First, it implies that the law is a knowable objective entity available for comprehension. Second, it implies the application of rational world rather than narrative standards for reasoning and evidence.

A narrative version of the good faith requirement would allow lawyers to bring claims which can be supported by narratives which meet the tests of narrative rationality (probability and fidelity). While narratives within the legal context might be judged by standards adapted to legal contexts, such standards do not yet exist. Therefore, only general standards of narrative rationality are now available to replace the good faith requirement of Rule 3.1.

Another objectionable rule is Rule 3.4(e), which says that a lawyer, while in trial, shall not:

> [A]llude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.[210]

This rule is objectionable on several grounds, and its several requirements require separate explication.

First, the rule forbids lawyers from mentioning any matter they believe is irrelevant. Since irrelevant materials inhibit rather than enhance decision making by *homo narrans* as well as *homo sapiens*, a narrative ethic would also favor omitting irrelevant matters from trial. A narrative rule would prohibit lawyers' alluding to matters unless they can offer a rational narrative which makes them relevant.

Second, the rule forbids the lawyer mentioning anything which will not be supported by admissible evidence. This creates some real dilemmas for the narrative analyst, because it requires adherence to evidence rules which may not allow the lawyer to present clients' stories. In fact, evidence rules often exclude evidence a lawyer might see as essential to support a client's story. Evidence rules often exclude ev-

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210. *Id.* Rule 3.4(e).

idence judged to be too prejudicial.[211] Such rules of evidence assume that the "proper" rational value of evidence can be determined (presumably by rational world standards of evidence and reasoning). These judgments also tend to assume that jurors, who lack subject matter knowledge and training in the finer points of logic and reasoning, cannot assign evidence its "proper" probative value. This is all alien to the narrative paradigm, which sees as relevant any evidence which supports litigants' stories, and which sees little to fear in the possibility of prejudice because all members of society are presumed to be imbued with the ability to evaluate the rationality of narratives.[212] This part of Rule 3.4(e) would have no place or equivalent within a narrative legal ethic.

Rule 3.4(e) forbids an attorney from asserting "personal knowledge of facts in issue" unless they are testifying, and from stating "a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."[213]

The purposes of this rule are difficult to discern, but since it serves to exclude certain statements from trial, the rule apparently functions, like the previously discussed part of Rule 3.4(e), to reinforce evidence rules by excluding irrelevant or prejudicial materials. Like the other portions of this rule, this part would be consistent with a narrative ethic to the extent that it reduces the confusion and wasted effort caused by the introduction of irrelevant materials into trials. To the extent that it attempts to exclude potentially "prejudicial" materials, the rule assumes that jurors lack the ability to evaluate properly the stories competing for their adherence, and is inconsistent with the narrative paradigm, which assumes the ability of all non-incapacitated persons to judge narratives rationally.

The last objectionable rule to be examined is Rule 3.6, which regulates lawyers' making out-of-court statements about trials. Rule 3.6(a) forbids making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication" when the lawyer "knows or reasonably should know" that such communication "will have a substantial likelihood of materially

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211. *See, e.g.*, FED. R. EVID. 403 (relevant evidence is excludable if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading of jury), 412 (evidence of alleged sex-crime victim's past sexual history admissible only if hearing shows probative value outweighs danger of unfair prejudice), and 609(a) (evidence of certain felony criminal convictions admissible to impeach witness only if court determines probative value outweighs prejudicial effect to defendant).

212. See note 91 *supra* and accompanying text.

213. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1983).

prejudicing an adjudicative proceeding.''[214] This rule incorporates several objectionable positivist assumptions.

Rule 3.6(a) only limits communications ''if the *lawyer knows or reasonably should know*'' of the likely prejudicial effect.[215] According to the Model Rules, '''Reasonably should know' *when used in reference to a lawyer* denotes that a *lawyer* of reasonable prudence and competence would ascertain the matter in question.''[216]

Unless the second appearance of the word ''lawyer'' in the Rule is surplusage, this rule assumes that a reasonably prudent and competent *lawyer* would ascertain the prejudicial effect differently than would a reasonably prudent and competent *person*. Presuming that the rule does not set a *lower* standard for lawyers, the rule suggests that lawyers' subject matter knowledge and training in formal reasoning give them a superior ability to ascertain the likelihood of a prejudicial effect. To this extent, the rule privileges training in logic and subject matter knowledge. Since narrativism holds that all persons not mentally incapacitated have the capacity to evaluate rationally the stories through which persons obtain knowledge of the world around them, a lawyer's knowledge and training do not necessarily provide a superior ability to ascertain the likelihood of a prejudicial effect. A narrative approach would agree that if lawyers rely on their expertise and training rather than their narrative rationality, they will view things differently than laypersons. However, narrativism would reject the implication that lawyers' perceptions will be superior.

The second aspect of Rule 3.6 that is objectionable from a narrative perspective is that the rule's very existence assumes that certain information is likely to produce a ''prejudicial'' effect on jurors. The earlier discussion of Rule 3.4(e) has noted that the idea of ''prejudicial effects'' itself implies that judges and legal experts are capable of determining, on the basis of their superior knowledge and reasoning skills, classes of evidence and information which, if introduced to a jury, will short-circuit the rational truth-finding process the jury is supposed to perform. This kind of thinking produces an elitism based on formal training that narrativists reject.[217]

Narrativism is not necessarily hostile to the apparent purpose of Rule 3.6 to see that trial outcomes are decided by what is presented at the trial, not what appears in the media. Since equal media access cannot be assured by the free market system and free speech guarantees

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214. Model Rules of Professional Conduct Rule 3.6(a) (1983).

215. *Id.* (emphasis added).

216. Model Rules of Professional Conduct Terminology 9 (1983) (emphasis added).

217. *See* note 74 *supra* and accompanying text.

that are immovable features of the American landscape, attempts to assure that accused and accuser have equal opportunities to present their competing stories may require restricting lawyers' publication of the stories they eventually will present at trial. The narrative approach, however, would disagree with limitations based upon the admissibility or alleged prejudicial nature of information as irreconcilable with the narrative paradigm's assumptions about the rationality of all persons and rejection of the privileging and elitism produced by positivism.

Rule 3.6(c) lists things a lawyer normally can release to the public. This rule allows certain basic information to be released "without elaboration," including the general nature of a claim or defense, contents of a public record, existence of investigation and persons being investigated, scheduling and results of steps in litigation, requests for assistance in investigation, warnings that a person's behavior may be dangerous (when reasonably necessary), and, in a criminal case, "the identity, residence, occupation and family status of the accused"; information "necessary to aid in apprehension" of a suspect; "the fact, time and place of arrest"; and "the identity of investigating and arresting officers or agencies and the length of the investigation."[218]

This rule is consistent with the narrative paradigm in the sense that the rule limits disclosure to isolated bits of information about a supposed crime, and requires disclosure made "without elaboration." This rule would prevent a prosecutor, who may have greater access to the media than a public defender or unknown private defense lawyer, from unfairly presenting an elaborate and persuasive narrative to potential jurors. And, to the extent that the rule keeps any lawyer from trying their case in the media, the inherent possibility of the law providing a fair hearing for competing stories at trial is preserved. A narrative paradigm would not reject this part of the rule.

D. Summary

This brief analysis of those selected Model Rules which directly regulate lawyers' communications with others reveals that the rules are consistent with the assumptions and practices of the dominant rational world paradigm and inconsistent with the narrative paradigm. It also reveals that a narrative legal ethic would and could alter rather than abandon most of these rules.

Conclusion

After too many years of ignoring the communicative and narrative dimensions of law, a number of legal scholars have begun to study

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218. *Id.* Rule 3.6(c).

legal narratives and to advocate a paradigm change from the positivist view of law which is currently dominant. The adoption of the narrative paradigm would require that legal scholars, teachers, and practitioners make wholesale changes in their understanding of every aspect of the law. Given the current interest in, and dissatisfaction with the current state of, legal ethics, a natural area for concern is the effects the adoption of a narrative perspective would have on how legal ethics is viewed.

There are myriad views of the nature of narrative. This Note has described the influential narrative paradigm of speech communication scholar Walter Fisher and used it to analyze legal ethics. Fisher's paradigm is very explicit about its underlying assumptions and differences with the positivist rational world thinking that currently dominates law. Thus, it is an appropriate perspective for analyzing the effects of a switch to a narrative paradigm.

Analysis of selected rules from the Model Rules has revealed that they reflect the rational world paradigm in ways that make them partly or entirely inconsistent with the narrative paradigm. The analysis has also revealed that many of the rules analyzed would be modified and retained in a narrative legal ethic.

This Note has shown the desirability of a greater emphasis on narrative legal studies and described one narrative theory in some detail. The Note has also shown how that paradigm opposes the dominant rational world paradigm shared by most legal scholars, teachers, and practitioners. Finally, it has revealed the foundations of a narrative legal ethic to help evaluate the implications of a paradigm shift from the rational world to the narrative paradigm. That being the moral of this story, there is but one part of the story remaining—The End.

Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard

BRAD A. GALBRAITH*

INTRODUCTION

The federal courts of the United States are immensely overcrowded.[1] Each year, more cases are filed than in the previous year, making the administration of justice progressively more difficult.[2] The search for solutions to this problem has continually focused upon alternative dispute resolution, and, in particular, arbitration.[3] At first glance, the arbitration process may appear to be a panacea. However, not all who have participated in the process would agree that arbitration is the ideal solution.[4]

Frequently, the commercial arbitration process fails to provide all parties to the process with the result they believe they deserve. The same can be said about litigation. When parties to a dispute before a court are deprived of their expectancy because of an error in interpretation of law by the court, the appellate process is available to correct the error. In the arbitration process, however, appellate review is rarely obtainable through the arbitration process itself.[5] As a result, parties who are disappointed with the arbitration process often turn to the federal court system for assistance.

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1. *See generally* Erwin N. Griswold, *The Federal Courts Today and Tomorrow: A Summary and Survey*, 38 S.C. L. REV. 393 (1987).

2. *See generally id. See also* Charley Roberts, *Rehnquist: U.S. Courts Face Crisis*, L.A. DAILY J., Jan. 2, 1992, at 4 ("Left unchecked, [Chief Justice Rehnquist] said, the current caseload crisis in the federal courts will lead to changes that will lower the quality of justice dispensed.").

3. *See, e.g.*, Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir.) ("Undoubtedly, encouraging parties to use this form of alternative dispute resolution in commercial transactions is premised on the concern for easing rising case loads of the judiciary."), *cert. denied*, 476 U.S. 1141 (1986).

4. *E.g.*, *id.* ("Although arbitration often is said to provide simple, inexpensive and expeditious dispute resolution, recent cases before this court, and comments by counsel, as in this case, cast considerable doubt upon such adjectival praise.").

5. *See* Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985) ("If the parties to an arbitration want appellate review of the merits of the arbitrator's decision, they can establish appellate arbitration panels, though they rarely do.").

The Federal Arbitration Act[6] provides the grounds upon which an arbitration award may be vacated in federal court.[7] Courts in some federal circuits have expanded upon these grounds, but have been inconsistent in defining what constitutes a ground sufficient to vacate a commercial arbitration award.[8] As a result, many practitioners who select and employ the arbitration process to resolve commercial disputes do not know upon what grounds an arbitration award may be vacated in the circuit in which they practice.[9]

The intense confusion caused by the conflicting grounds used by the various circuits to vacate commercial arbitration awards demands immediate attention. This Note will identify the statutory and nonstatutory grounds recognized for vacating commercial arbitration awards in the differing circuits.[10] Most importantly, this Note will contemplate whether the statutory grounds for vacation provided by the Federal Arbitration Act[11] are best construed as exclusive, or whether additional judicially-created grounds for vacating commercial arbitration awards are required for the arbitration process to fulfill its intended purposes.

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6. 9 U.S.C. § 1-16 (1988 & Supp. III 1991).

7. 9 U.S.C. § 10(a) (Supp. III 1991).

8. *See, e.g.*, R.M. Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539 n.1 (5th Cir. 1992). *See also infra* parts IV, V, VI.

9. *See generally* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 468-69 (1988) (discussing bar perception of judicial review of arbitration awards based upon an American Bar Association survey).

10. The Federal Arbitration Act, 9 U.S.C. § 1-16 (1988 & Supp. III 1991), provides the same grounds for vacating arbitration awards in labor disputes within the purview of the Act as those used in reviewing commercial arbitration awards. The courts have developed additional grounds for vacation of arbitral awards in labor disputes that are similar to those recognized by some courts in the commercial context. Although the additional grounds for vacating labor arbitration awards are often discussed alongside grounds for vacating commercial arbitration awards, they are not analogous. Underlying the grounds for vacating labor dispute arbitration awards are policies applicable only to labor disputes. The scope of this Note will be confined to discussing grounds for vacatur of commercial arbitration awards. *See, e.g.*, United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37 (1987) ("The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations."); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (An arbitrator's "award is legitimate only so long as it draws its essence from the collective bargaining agreement."); Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985) (explaining vacation of arbitration awards in labor dispute cases is influenced by the Taft-Hartley Act (Labor Management Relations Act), 29 U.S.C. § 185.). *See generally* Douglas E. Ray, *Court Review of Labor Arbitration Awards Under the Federal Arbitration Act*, 32 VILL. L. REV. 57 (1987) (discussing grounds for vacating labor arbitration awards).

11. 9 U.S.C. § 10(a) (Supp. III 1991).

I. The Supposed Virtues of Arbitration

In recent years, the legal community has expressed increased approval of arbitration.[12] The past-president of the American Bar Association (ABA) recently expressed his approval for the arbitration process in a speech to the American Arbitration Association.[13] After chronicling the growth in use of alternative dispute resolution, Talbot D'Alemberte, then president-elect of the ABA, quoted former Chief Justice Burger saying: "[I]n the public interest we must move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration, mediation, and conciliation."[14] The former Chief Justice has long advocated resolving commercial disputes through arbitration.[15]

The approval of arbitration has also been displayed in a number of court opinions.[16] Although the arbitral process was once looked upon rather suspiciously by the courts, the Supreme Court has noted that the suspicion seems to have passed.[17] Considering the courts' new-found respect for the arbitral process, and the problems incurred in modern adjudication,[18] arbitration appears to be the wave of the future.

The virtues of arbitrating commercial disputes are often advertised to the practicing bar and commercial public.[19] In the controversial book, *The Litigation Explosion - What Happened When America Unleashed*

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12. *See, e.g.*, Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986) ("Congress, through the Federal Arbitration Act, (citation omitted), as well as the Supreme Court have expressed increased approval of the use of arbitration rather than public adjudication through the courts."), *cert. denied,* 476 U.S. 1141 (1986).

13. Talbot D'Alemberte, Address at American Arbitration Association Arbitration Day '91 (February 27, 1991), *in ABA Officer: ADR Has Come Into Its Own*, Arb. J., Mar. 1991, at 3, 3.

14. *Id.* at 62.

15. *See, e.g.*, Chief Justice Warren E. Burger, Address to the American Arbitration Association and the Minnesota State Bar Association (Aug. 21, 1985), *in Using Arbitration to Achieve Justice*, Arb. J., Dec. 1985, at 3, 6 ("My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases.").

16. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626-27 (1985).

17. *See id.* ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.").

18. Learned Hand once said: "[A]s a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." Burger, *supra* note 15, at 4.

19. *See, e.g.*, D'Alemberte, *supra* note 13, at 3; Jean E. Faure, Comment, *The Arbitration Alternative: Its Time Has Come*, 46 Mont. L. Rev. 199 (1985); C. Evan Stewart, *Dissenting Voice on Securities Arbitration*, Legal Times, Aug. 21, 1989, at 23 (Commenting that the securities industry "argues that arbitration is good for all parties.").

the Lawsuit,[20] the author, speaking about alternative dispute resolution in general, commented that the process "usually offers quicker, cheaper, and more reliable resolution than trial court."[21] These virtues are often bestowed upon arbitration.[22] Other supposed virtues include simplicity,[23] privacy,[24] informality,[25] finality,[26] and the benefit of having experienced arbitrators who are knowledgeable about the subject in dispute.[27]

Upon first glance these virtues appear compelling. However, lately they have been called into question.[28] C. Evan Stewart, General Counsel of the Nikko Securities Company International Inc., has commented that "[t]he trumpeted benefits appear substantial. Unfortunately, they are largely illusory."[29]

Many problems which arise in litigation are cured by the appellate process. Because those same problems go unsolved in the arbitration process, commentators and practitioners have argued that the grounds for vacation of commercial arbitration awards provided by the Federal Arbitration Act should be expanded to provide more broad appealability.[30]

II. The Federal Arbitration Act

A. The History of the Act

The Federal Arbitration Act[31] is applicable when parties to a maritime or commercial transaction provide in their contract, or agree in writing

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20. Walter K. Olson, The Litigation Explosion—What Happened When America Unleashed The Lawsuit (1991).

21. *Id.* at 303.

22. *See, e.g.*, American Arbitration Association Commercial Arbitration Rules, introduction (Jan. 1, 1990); Robert Coulson, Business Arbitration—What You Need To Know 9 (1987); Leo Kanowitz, *Alternative Dispute Resolution and The Public Interest: The Arbitration Experience*, 38 Hastings L.J. 239, 255 (1987); Stewart, *supra* note 19.

23. *See, e.g.*, Coulson, *supra* note 22.

24. *See, e.g.*, American Arbitration Association Commercial Arbitration Rules, *supra* note 22.

25. *See, e.g.*, Coulson, *supra* note 22; Stewart, *supra* note 19.

26. *See, e.g.*, Coulson, *supra* note 22; Stewart, *supra* note 19.

27. *See, e.g.*, Kanowitz, *supra* note 22; Stewart, *supra* note 19.

28. *See, e.g.*, Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986); Kanowitz, *supra* note 22, at 303. *See generally* Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984) (criticizing arbitration and arguing against its use).

29. Stewart, *supra* note 19.

30. *See, e.g.*, *Stroh Container Co.*, 783 F.2d at 751 n.12 ("Counsel for [appellant] has suggested to us that if the appellate courts are in effect unwilling to provide the same review of an arbitration proceeding as is given to a judgment of a district court, that commercial arbitration will cease and the courts will be further inundated with more litigation."); C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 Ky. L.J. 347, 356 (1991) ("[A]rbitrants need a broadened right of appeal—at a minimum, one in which an arbitrator's interpretation of governing law is reviewable.").

31. 9 U.S.C. § 1-16 (1988 & Supp. III 1991).

after the controversy arises, to settle disputes arising from the transaction or contract by arbitration.[32] Prior to the Act's passage, the proposed bill received overwhelming support from the business community,[33] and as a result, received no dissenting votes in either the House or Senate.[34] President Coolidge signed the Federal Arbitration Act (also known as the United States Arbitration Act) into law on February 12, 1925, and it became effective on January 1, 1926.[35]

Before the Federal Arbitration Act became effective, agreements to arbitrate were unenforceable in the federal courts.[36] The policy of refusal to enforce these agreements began in England where the courts were jealous of, and felt threatened by, the arbitration process.[37] The practice of refusing to enforce agreements to arbitrate was incorporated into the law of the United States via the adoption of England's common law.[38] In order to abrogate the firmly established common law, Congress undertook to pass the Federal Arbitration Act.[39] The House Report on the bill noted:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.[40]

Regularly, the federal courts have remarked that "[t]he purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that

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32. 9 U.S.C. § 2 (1988). Section 2 provides:
A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

33. Committee on Commerce, Trade and Commercial Law of the American Bar Association, *The United States Arbitration Law and its Application*, 11 A.B.A. J. 153, 153 (1925).

34. *Id.*

35. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926).

36. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924).

37. *Id.* at 1-2.

38. *Id.*

39. *Id.*

40. *Id.* at 1.

would be speedier and less costly than litigation."[41] However, the Supreme Court recently addressed the policies underlying the Federal Arbitration Act in *Dean Witter Reynolds, Inc. v. Byrd*,[42] commenting that "[t]he legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."[43]

Unmistakably though, Congress, in passing the Act, did recognize the incidental benefits of making agreements to arbitrate enforceable.[44] The House Report stated: "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can largely be eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."[45] The Court in *Dean Witter*, after discussing the House Report, concluded:

> Nonetheless, passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principle objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.[46]

These underlying purposes of the Act must be carefully considered when determining whether the provisions of the Federal Arbitration Act should be supplemented.

B. Vacating an Arbitral Award Under the Federal Arbitration Act

A party to an arbitration who seeks to challenge the validity of an arbitration award in federal court pursuant to the Federal Arbitration

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41. Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1179 (11th Cir. 1981) (citations omitted). *See also* Wilko v. Swan, 346 U.S. 427, 431 (1953); Robbins v. Day, 954 F.2d 679, 682 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); O.R. Securities, Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 745-46 (11th Cir. 1988) (citation omitted); *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) ("The movement finds its origin in the unfortunate congestion of the courts and the delay, expense and technicality of litigation.").

42. 470 U.S. 213 (1985).

43. *Id.* at 219.

44. *Id.* at 220.

45. H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924).

46. *Dean Witter*, 470 U.S. at 220 (footnote omitted).

Act must file an application for an order vacating the award.[47] The application "shall be made and heard in the manner provided by law for the making and hearing of motions."[48] Federal Rule of Civil Procedure 7(b) provides that "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."[49]

Section 10(a) of the Federal Arbitration Act (formerly section 10(a)-(e)) sets forth the grounds upon which an arbitration award may be vacated.[50] The Act provides as follows:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

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47. 9 U.S.C. § 6 (1988).

48. *Id.*

49. FED. R. CIV. P. 7(b).

50. 9 U.S.C. § 10(a) (Supp. III 1991). Although sometimes referred to by the courts as providing provisions for appealing arbitration awards, 9 U.S.C. § 11 (1988) will not be discussed in this note. Section 11 provides:

> In either of the following cases the United States court in the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.[51]

Although the Federal Arbitration Act provides some of the same grounds which are generally available to vacate federal court awards, it does not provide parties to an arbitral award with all the same grounds that are available to parties seeking to vacate court awards. It is essential to a thorough understanding of the Act's provisions for vacatur to recognize that the Federal Arbitration Act provides no express ground upon which an award may be overturned because of a simple mistake of fact or misinterpretation of law by the arbitrators.[52] But are the express grounds provided by Section 10(a) exclusive?

The Supreme Court has not clearly addressed this issue. Although many federal courts acknowledge the provisions of the Act as exclusive,[53] others have recognized additional grounds derived from the language of the Act for vacating commercial arbitration awards.[54] Furthermore, some federal courts have recognized grounds for vacating commercial arbitration awards entirely outside the Act's provisions.[55]

III. The Confusion Begins

In 1953, the Supreme Court decided the landmark case of *Wilko v. Swan*.[56] Wilko, a customer of the defendant securities brokerage firm,

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51. 9 U.S.C. § 10(a) (Supp. III 1991).

52. *See, e.g.*, Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 n.4 (1956) ("Whether the arbitrators misconstrued a contract is not open to judicial review."); Robbins v. Day, 954 F.2d 679, 683 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); Advest v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990) ("The statute contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal bevues.").

53. *See, e.g.*, R.M Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539-40 (5th Cir. 1992) ("[J]udicial review of a commercial arbitration award is limited to Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. § 1 et seq." (citation and footnote omitted)); O.R. Securities, Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 746 (11th Cir. 1988); Moseley, Hallgarten, Estabrook & Weeden v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988) ("Sections 10 and 11 of the Act set forth the exclusive grounds for vacating or modifying a commercial arbitration award." (citation omitted)); LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1338 (9th Cir. 1986) (The "federal Arbitration Act provides the exclusive grounds for challenging an arbitration award within its purview." (citation omitted)).

54. *See, e.g.*, Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412 (11th Cir. 1990) ("Although the Supreme Court has held that the grounds for vacating an arbitrator's award are limited to five statutory categories, (citations omitted), several federal courts have found other grounds, derived from the statutory list, for vacating such awards.").

55. *See, e.g.*, *Advest*, 914 F.2d at 8.

56. 346 U.S. 427 (1953).

brought an action to recover damages pursuant to the Securities Act of 1933.[57] Wilko claimed the defendants had made misrepresentations and had omitted important information, thereby inducing Wilko to purchase stock that was later sold at a loss.[58] The margin agreements between the plaintiff and the defendant provided for arbitration of disputes arising out of the securities transactions. The defendants moved to stay trial of the matter pursuant to section 3 of the Federal Arbitration Act,[59] which provides for a stay "until such arbitration has been had in accordance with the terms of the agreement."[60] The district court held that the predispute agreement deprived the plaintiff of the remedies provided by the Securities Act, and therefore, denied the stay.[61] The Second Circuit Court of Appeals concluded that the predispute agreement to arbitrate was valid, and reversed the district court's denial.[62] In deciding that predispute agreements to arbitrate claims under the Securities Acts of 1933 and 1934 were invalid, the United States Supreme Court stated: "Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act."[63] Recently, in *Shearson/American Express, Inc. v. McMahon*,[64] and *Rodriguez De Quijas v. Shearson/American Express, Inc.*,[65] the Court overturned *Wilko*, thus making predispute agreements to arbitrate claims under the Securities Acts of 1933 and 1934 enforceable.[66]

The *Wilko* opinion, however, has considerably more significance than its holding on the issue of the enforceability of predispute arbitration agreements. A dictum from the *Wilko* opinion has caused disarray among the federal circuits regarding the grounds upon which an arbitral award can be vacated. The Court stated, the "[p]ower to vacate an award is limited. . . . In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation."[67]

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57. *Id.* at 428.
58. *Id.* at 429.
59. *Id.*
60. 9 U.S.C. § 3 (1988).
61. *Wilko*, 346 U.S. at 429-30.
62. *Id.* at 430.
63. *Id.* at 438.
64. 482 U.S. 220 (1987).
65. 490 U.S. 477 (1989).
66. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).
67. *Wilko*, 346 U.S. at 436-37 (emphasis added).

Since *Wilko*, courts have struggled to determine what grounds are valid for vacating commercial arbitration awards.[68] Not only have courts grappled with whether the "manifest disregard" referred to in *Wilko*[69] was intended by the Court to be a judicially created exception to the Federal Arbitration Act,[70] they have also had difficulty determining what was meant by the phrase "manifest disregard" of the law.[71] Illustrating the courts' frustration, Judge Oakes of the Second Circuit Court of Appeals, in *I/S Stavborg v. National Metal Converters, Inc.*,[72] remarked: "How courts are to distinguish in the Supreme Court's phrase between 'erroneous interpretation' of a statute, or for that matter, a clause in a contract, and 'manifest disregard' of it, we do not know: one man's 'interpretation' may be another's 'disregard.' Is an 'irrational' misinterpretation a 'manifest disregard'?"[73]

IV. The Definitions of "Manifest Disregard" of the Law

A. The Early Approaches

Many courts have announced that judicial review of commercial arbitration awards is severely limited.[74] The Federal Arbitration Act "does not allow courts to roam unbridled in their oversight of arbitral awards."[75] In accordance with this policy, courts accepting the *Wilko* dictum[76] as

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68. *See, e.g.*, R.M Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539 n.1 (5th Cir. 1992) ("Circuits differ over whether to augment the statutory bases for review provided in the Arbitration Act, with the manifest disregard of the law standard." (citations omitted)).

69. 346 U.S. at 436.

70. *See, e.g.*, National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co., 551 F.2d 136, 143 n.9 (7th Cir. 1977); I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 431 (2d Cir. 1974).

71. *See, e.g.*, *I/S Stavborg*, 500 F.2d at 431 (indicating that inferior courts are having difficulty defining "manifest disregard"); San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961).

72. 500 F.2d at 424.

73. *Id.* at 430 n.13. *See also Saguenay Terminals Ltd.*, 293 F.2d at 801 ("The [*Wilko*] court [sic] did not undertake to define what it meant by 'manifest disregard' or indicate where the line would be drawn between a case of 'manifest disregard' and a case of error in interpretation of the law."); *Id.* at n.4. ("Frankly, the Supreme Court's use of the words 'manifest disregard', has caused us trouble here.").

74. *See, e.g.*, Robbins v. Day, 954 F.2d 679, 683 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); Chameleon Dental Products, Inc. v. Jackson, 925 F.2d 223, 225 (7th Cir. 1991); Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512, 516 (2d Cir.), *cert. denied*, 112 S. Ct. 380 (1991), *cert. denied again*, 112 S. Ct. 1241 (1992); Advest, Inc. v. McCarty, 914 F.2d 6, 8 (1st Cir. 1990).

75. *Advest*, 914 F.2d at 8; *See also Robbins*, 954 F.2d at 683.

76. 346 U.S. 427, 436-37 (1953).

authorizing vacatur of arbitral awards for "manifest disregard" of the law have narrowly defined the standard.[77]

Early attempts at defining "manifest disregard" of the law focused on the arbitrator's understanding of the law. In the 1961 case of *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*,[78] the Ninth Circuit Court of Appeals wrote: "We apprehend that a manifest disregard of the law in the context of the language used in *Wilko v. Swan* might be present when arbitrators understand and correctly state the law, but proceed to disregard the same."[79] Although the early definitions of "manifest disregard" were noble endeavors to explain what a "manifest disregard" of the law was, the definitions were not easily applied to factual situations.[80]

B. The Merrill Lynch v. Bobker Approach

The most notable attempt at creating a functional definition of "manifest disregard" of the law emerged from a recent case before the Second Circuit Court of Appeals. In *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*,[81] Merrill Lynch, a securities brokerage firm, moved to vacate an arbitration award claiming the arbitrators had acted in manifest disregard of the law in granting the arbitration award for the plaintiffs.[82] The dispute heard by arbitrators concerned the applicability of a Securities Exchange Commission (SEC) rule to a particular securities transaction. Upon application to the district court for an order vacating the arbitration award, the court held that the "arbitrators were aware of the [SEC] Rule and its purpose yet proceeded to ignore it."[83] As a result, the district court vacated the award on the ground that the arbitrators had acted in manifest disregard of the law.[84]

Bobker, the plaintiff, then appealed the district court determination.[85] The Second Circuit, formulating a test for "manifest disregard" of the law said:

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal

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77. *See infra* Part IV. B-C.
78. 293 F.2d 796 (9th Cir. 1961).
79. *Id.* at 801 (citation omitted).
80. *E.g., id.* at 801-02.
81. 808 F.2d 930 (2d Cir. 1986).
82. *Id.* at 933.
83. *Id.*
84. *Id.*
85. *Id.*

> principle but decides to ignore or pay no attention to it. To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the 'manifest disregard' standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it.[86]

Applying the above expressed test to the facts of *Bobker*, the court of appeals determined that the disputed SEC rule was unclear, and thus, the actions of the arbitrators did not meet the test for "manifest disregard" of the law.[87] Instead, the court indicated this was merely a case of the arbitrators misinterpreting the law.[88] Accordingly, the district court order vacating the arbitration award was reversed.[89]

The Second Circuit's explanation of "manifest disregard" of the law in *Bobker* is often cited by courts when reviewing commercial arbitration awards to determine whether the arbitrators acted in "manifest disregard" of the law.[90] It is interesting and informative to note that the court of appeals in *Bobker* failed to find that the arbitrators had acted in "manifest disregard" of the law. In fact, although the "manifest disregard" of the law standard has been discussed in dozens of cases involving judicial review of arbitration awards resulting from securities disputes, no cases have been identified wherein vacation of a securities arbitration award has been clearly upheld on appeal.[91]

C. Use of the "Manifest Disregard" Standard In Other Circuits

Although the *Bobker* approach has been well-received, not all circuits recognizing "manifest disregard" of the law as a ground for vacating

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86. *Id.* at 933-34 (citations omitted).

87. *Id.* at 936-37.

88. *Id.* at 937.

89. *Id.*

90. *See, e.g.*, Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche International, Ltd., 888 F.2d 260, 265 (2d Cir. 1989); Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991); Robbins v. PaineWebber, Inc., 761 F. Supp. 773, 776 (N.D. Ala. 1991), *rev'd*, Robbins v. Day, 954 F.2d 679 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992).

91. *See* Ainsworth v. Skurnick, 909 F.2d 456, 457-58 (11th Cir. 1990) (noting that the district court had vacated the arbitration award as being in "manifest disregard" of the law, but certifying a question to the Florida Supreme Court regarding state law), *aff'd*, 960 F.2d 939, 941 (11th Cir. 1992) (noting that the district court's finding of "manifest disregard" of the law may have been erroneous, but affirming on other grounds), *cert. denied*, 113 S. Ct. 1269, *reh'g denied*, 113 S. Ct. 1883 (1993); *Robbins*, 761 F. Supp. at 773 (finding "manifest disregard" of the law).

a commercial arbitration award have adopted it as their own. In *Robbins v. PaineWebber, Inc.*,[92] Robbins claimed she had been the victim of securities fraud. Upon application to the federal district court for vacatur of the arbitral award, the court determined that the arbitrators must have found fraud because the record of the arbitration supported that finding.[93] Under the Alabama Securities Act, a finding of fraud requires the award of attorney's fees and costs.[94] The district court inferred that, based upon the lump sum award amount, the arbitrators must have disregarded the statutory damages provision, and thus, had acted in "manifest disregard" of the law.[95] In so holding, the court stated: "The error of not applying this provision would be readily and instantly perceived by a typical arbitrator; these arbitrators were cognizant of the proper legal standard and disregarded it in fashioning the award; and their disregard of the applicable law is indisputably apparent on the face of the record."[96] Accordingly, the court vacated the arbitration award.[97]

On appeal, the Eleventh Circuit explained:

> When no rationale is given for a lump sum award, as in this case, before we even consider reviewing the award on grounds not explicitly contained in the statute, we must first determine whether a rational ground for the arbitrator's decision can be inferred from the facts of the case. Where "a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed."[98]

The court concluded: "Our deferential review of the arbitrator's award satisfies us that the arbitrators stayed well within their broad discretion in facilitating a fair hearing and in fashioning the award. Because the district court when vacating the award failed to adhere to the narrow and deferential standard of review, we reverse and confirm the arbitrator's award."[99]

In the *Robbins* opinion, the Eleventh Circuit noted that among those circuits endorsing the "manifest disregard" of the law standard, there is inconsistency as to how the disregard must be manifested.[100] "Some courts require that the arbitrator's subjective awareness of the disregarded

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92. 761 F. Supp. at 773.
93. *Id.* at 777.
94. *Id.* (citing Ala. Code § 8-6-19).
95. *Id.*
96. *Id.* at 776-77 (citing Raiford v. Merrill Lynch, Pierce, Fenner & Smith, 903 F.2d 1410, 1412-13 (11th Cir. 1990)).
97. *Id.*
98. Robbins v. Day, 954 F.2d 679, 684 (11th Cir.) (citing *Raiford*, 903 F.2d at 1412), *cert. denied*, 113 S. Ct. 201 (1992).
99. *Id.* at 685.
100. *Id.* at 683.

law be actually stated in the award, while others are willing to infer awareness."[101] The First and Second Circuits appear to have adopted an approach allowing the court to infer awareness on the part of the arbitrators,[102] while the Eleventh Circuit appears to have endorsed the approach requiring the manifest disregard to be stated in the arbitration award.[103]

Many other courts have discussed, but have not adopted, the "manifest disregard" of the law standard.[104] Illustrating one reason why some circuits have refused to adopt the "manifest disregard" standard, the Eleventh Circuit recently wrote: "This court has never adopted the manifest-disregard-of-the-law standard; indeed, we have expressed some doubt as to whether it should be adopted since the standard would likely never be met when the arbitrator provides no reasons for its award (which is typically the case)."[105] In addition, many of the circuits which have discussed the "manifest disregard" of the law standard have refused to adopt it as their own because it has proven to be extremely difficult to apply to factual situations.

V. Additional Grounds for Vacation

A. The Arbitrary and Capriciousness, Irrationality, Ambiguous or Indefiniteness, and Public Policy Exceptions

Some circuits have developed additional grounds for vacating commercial arbitration awards. For example, the Eleventh Circuit has used

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101. *Id.* at 683-84 (citing O.R. Securities, Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 746 (11th Cir. 1988)).

102. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) ("The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as arbitrator."); Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990).

103. *See, e.g.*, *O.R. Securities, Inc.*, 857 F.2d at 747 ("If a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it."); *Robbins*, 954 F.2d at 679.

104. See, e.g., Chameleon Dental Products, Inc. v. Jackson, 925 F.2d 223, 226 (7th Cir. 1991) ("In seeking to vacate the arbitration award Chameleon also urges us to adopt the so-called 'manifest disregard of the law' exception to the statutory review provisions of the Arbitration Act, (citation omitted). However, we have consistently held that the exclusive grounds for vacating or modifying a commercial arbitration award are found in §§ 10 and 11 of the Arbitration Act. (citation omitted). We have not adopted exceptions to the exclusivity of §§ 10 and 11 and see no reason to do so in this case."); Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1269, *reh'g denied*, 113 S. Ct. 1883 (1993); R.M Perez & Assoc., Inc. v. Welch, 960 F.2d 534, 539 (5th Cir. 1992); *Robbins*, 954 F.2d at 685; Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991); Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 903 F.2d 1410, 1412 (11th Cir. 1990).

105. *Raiford*, 903 F.2d at 1412.

the rationale that an arbitrary and capricious arbitration award may not be enforced.[106] The Second Circuit has noted that a commercial arbitration award which is irrational may be vacated,[107] and that an ambiguous or indefinite commercial arbitration award should not be enforced.[108]

Some courts have indicated that public policy may justify refusal to enforce a commercial arbitration award. The Second Circuit has noted that "[a]lthough contravention of public policy is not one of the specific grounds for vacation set forth in section 10 of the Federal Arbitration Act, an award may be set aside if it compels the violation of law or is contrary to a well accepted and deeply rooted public policy."[109] This ground for refusal to enforce a commercial arbitration award applies not only in the arbitration context but also to contracts in general. The United States Supreme Court has stated:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that public policy, it is the obligation of the courts to refrain from such exertions of judicial power.[110]

B. Is There A Difference Between These Exceptions?

Although the various exceptions are described in many different ways by the courts which have endorsed them, is there truly a difference between them? The First Circuit Court of Appeals recently stated:

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106. *See, e.g.*, *Ainsworth*, 960 F.2d at 941; *Raiford*, 903 F.2d at 1412-13 ("An award is arbitrary and capricious only if 'a ground for the arbitrator's decision can[not] be inferred from the facts of the case.'" (quoting Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1216 (2d Cir. 1972)); *see also* Clemons v. Dean Witter Reynolds, Inc., 708 F. Supp. 62 (S.D.N.Y. 1989).

107. *See, e.g.*, French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986); I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 431 (2d Cir. 1974). *Contra* Moseley, Hallgarten, Estabrook & Weeden v. Ellis, 849 F.2d 264, 267 n.7 (7th Cir. 1988).

108. *E.g.*, Americas Ins. Co. v. Seagull Compania Naviera, 774 F.2d 64, 67 (2d Cir. 1985).

109. Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1110-11 (2d Cir. 1980) (citations omitted); *see also* Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83 (D.C. Cir.), *cert. denied*, 446 U.S. 983 (1980). *But see Ellis*, 849 F.2d at 267 n.7.

110. Hurd v. Hodge, 334 U.S. 24, 34-35 (1948). *See also* Muschany v. United States, 324 U.S. 49, 66 (1945) (declaring that public policy is to be determined by reference to specific laws, not general considerations of public interests).

> Although the differences in phraseology have caused a modicum of confusion, we deem them insignificant. We regard the standard of review undergirdering these various formulations as identical, no matter how pleochroic their shadings and what "terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice."[111]

Although the court's approach may seem overly simplistic, an in-depth analysis of the court's view is beyond the scope of this Note. It is sufficient to note that the determination of whether these grounds should be recognized as justifying vacatur of a commercial arbitration award rests upon the same principal policies implicit in determining whether the "manifest disregard" of the law standard should be recognized.[112]

VI. Is the "Manifest Disregard" of the Law Standard a Judicially Created Ground Independent of the Federal Arbitration Act Provisions for Vacatur?

A detailed analysis of the "manifest disregard" of the law standard raises a fundamental question: Was the dictum in *Wilko v. Swan*[113] intended to create a new and additional ground for vacating commercial arbitration awards? Although some courts frequently refer to the "manifest disregard" of the law standard as a judicially created ground for vacatur of arbitral awards,[114] not all circuits agree.[115]

In *Amicizia Societa Navegazione v. Chilean Nitrate Corp.*,[116] the Second Circuit Court of Appeals stated: "It is true that an award may be vacated where the arbitrators have 'exceeded their powers.' 9 U.S.C.

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111. Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990) (quoting Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 634 (10th Cir. 1988)).

112. An argument may be made that the "public policy" exception is based upon policies applicable to all contracts, and thus, the exception should be viewed from outside the arbitration framework. Discussion of this rationale is beyond the scope of this Note.

113. 346 U.S. 427, 436-37 (1953).

114. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) ("'Manifest disregard of the law' by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in Wilko v. Swan." (citation omitted)).

115. *See, e.g.*, Robbins v. Day, 954 F.2d 679, 683 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); National R.R. Passenger Corp. v. Chesapeake and Ohio Ry. Co., 551 F.2d 136, 143 n.9 (7th Cir. 1977); I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 431 (2d Cir. 1974); Amicizia Societa Navegazione v. Chilean Nitrate Corp., 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960).

116. 274 F.2d 805 (2d Cir. 1960).

§ 10[(a)(4)]. Apparently relying upon this phrase, the Supreme Court in *Wilko v. Swan*, suggested that an award may be vacated if in 'manifest disregard' of the law.''[117] This language suggests that the Supreme Court in *Wilko* may have intended merely to illustrate an instance which would fall within the scope of the Federal Arbitration Act's provisions for vacating an arbitration award.

The interpretation of the *Wilko* dictum in *Amicizia* has not attracted much judicial attention;[118] however, implicitly, the interpretation appears to have support.[119] Recently, in *Robbins v. Day*,[120] the Eleventh Circuit commented that ''[a]lthough the Supreme Court has limited the grounds for vacatur to the categories enumerated in 9 U.S.C. § 10, several federal courts have found other grounds, *derived from the statutory list*, for vacating arbitration awards in commercial cases.''[121] By so stating, the court appears to suggest that the ''manifest disregard'' of the law standard, as well as other grounds, stem from, and are not independent of, the Federal Arbitration Act provisions for vacatur.[122] Subsequent to the *Robbins* decision, at least one district court in the First Circuit has construed the *Robbins* opinion to restrict the courts to the use of the statutory grounds for vacating arbitration awards.[123] That court, after denying a plaintiff's motion to vacate a securities arbitration award, quipped: ''[T]he Court predicts an impending bear market on the legal horizon for judicially created means of arbitration vacatur and declines the defendant's invitation to invest in this speculative venture at the current time.''[124]

The *Wilko* opinion may also be read to support the proposition that ''manifest disregard'' of the law was not intended to become an independent, judicially created standard for vacating commercial arbitration awards. The Court stated that the ''[p]ower to vacate an award is limited.''[125] Significantly, the Court followed this sentence with a

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117. *Id.* at 808 (citations omitted).

118. Although not often discussed by the courts, this approach has been noted on occasion. *See, e.g.*, *National R.R. Passenger Corp.*, 551 F.2d at 143 n.9 (''We share the reservations recently expressed by the Second Circuit as to whether the *Wilko* dictum was actually intended to add 'manifest disregard' of the law to the statutory grounds for vacating an award in 9 U.S.C. § 10.'' (citing *I/S Stavborg*, 500 F.2d at 431)). Recall however, since the date of the *National R.R. Passenger Corp.* opinion, the Second Circuit has endorsed the use of the ''manifest disregard'' standard calling it a judicially created standard. *See Bobker*, 808 F.2d at 933.

119. *See infra* notes 125-28 and accompanying text.

120. 954 F.2d 679 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992).

121. *Id.* at 683.

122. *See* 9 U.S.C. § 10(a) (Supp. III 1991).

123. Brown v. Rauscher Pierce Refsnes, Inc., 796 F. Supp. 486 (M.D. Fla. 1992).

124. *Id.* at 505-06.

125. 346 U.S. 427, 436 (1953).

citation to the Federal Arbitration Act provisions for vacation of arbitral awards.[126] Thereafter, the Court does not vary from the statement that the power to vacate is limited, but instead appears to illustrate the use of § 10(a)(4).[127] Granted, this construction of the *Wilko* opinion may be tenuous; however, it is certainly no more tenuous than the significance federal courts have bestowed upon the *Wilko* dicta when attempting to justify use of the "manifest disregard" of the law standard.

Additionally, in a recent case before the Supreme Court, Justice Stevens, in a dissenting opinion, collaterally mentioned that "[a]rbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. § 10."[128] Here too, the fact that the phrase "manifest disregard of the law" is followed by a citation to the Federal Arbitration Act provisions for vacatur, suggests that "manifest disregard" merely refers to or restates the statutory grounds.

VII. Should "Manifest Disregard" of the Law be a Ground for Vacatur, Independent of the Federal Arbitration Act Provisions?

Inevitably, regardless of whether the court intended "manifest disregard" of the law[129] mentioned in *Wilko v. Swan* to be a ground for vacating a commercial arbitration award, independent from the Federal Arbitration Act, when the Supreme Court resolves the issue of whether manifest disregard of the law is an exception to the statutory grounds for vacatur, the determination by the Court will rely heavily upon other factors. Most importantly, the Court must consider the policies underlying the Federal Arbitration Act, and whether the lower courts have the ability to make such an exception functional.

A. The Policy Argument

The predominant policy behind passage of the Federal Arbitration Act was to make arbitration agreements enforceable at law.[130] A secondary purpose "was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation."[131] Both of these policies are compromised

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126. *Id.*

127. *Id.* Note that since *Wilko*, the Federal Arbitration Act has been amended. The former 9 U.S.C. § 10(d), as of 1990, is 9 U.S.C. § 10(a)(4).

128. Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 656 (1985).

129. 346 U.S. at 436.

130. *See supra* note 45 and accompanying text.

131. O.R. Securities, Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 745-46 (11th Cir. 1988) (quoting Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1179 (11th Cir. 1981)). *See also supra* notes 45-48 and accompanying text.

when parties are forced to arbitrate a dispute, but are later permitted to resort to the court system for an appeal.[132]

What is the advantage in making agreements to arbitrate commercial disputes when the losing party in the arbitration may routinely resort to the courts for relief from the arbitrators' award? Certainly, too, providing court review of the arbitrators' award, regardless of how summary the proceeding is intended to be, results in a resolution of the dispute which is longer in duration and requires more legal assistance than had the arbitration award been enforced.[133] Clearly, the policies underlying the Federal Arbitration Act are not best served by expanding upon the Act's grounds for vacating arbitral awards. It is for this reason that the federal courts have traditionally construed the provisions of the Federal Arbitration Act very strictly.[134]

In addition to thwarting the purposes for which the Federal Arbitration Act was passed, providing grounds for vacation outside the Federal Arbitration Act also frustrates the intent of the parties who bargained for the arbitration process to resolve their disputes. Parties to an arbitration agree to enter the process because the virtues which are advertised to the commercial public are substantial. These virtues quickly disappear when the disappointed party is permitted to resort to the courts. For this reason, the Seventh Circuit recently noted that "an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative."[135]

When the parties have entered into the contract or arbitration agreement freely and have themselves chosen the terms, they should be forced to abide by the terms of the contract as any other contract.[136] After

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132. *O.R. Securities*, 857 F.2d at 746 ("The policy of expedited judicial action expressed in section 6 of the Federal Arbitration Act, 9 U.S.C. § 6, would not be served by permitting parties who have lost in the arbitration process to file a new suit in federal court."); Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967) ("Any such exception [i.e., manifest disregard] must be severely limited, because extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings.").

133. *Saxis Steamship Co.*, 375 F.2d at 582.

134. *See* Office of Supply, Gov't of the Republic of Korea v. New York Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972) ("Judicial review has been thus restricted in order to further the objective of arbitration, which is to enable parties to resolve disputes promptly and inexpensively, without resort to litigation and often without any requirement that the arbitrators state the rationale behind their decision.").

135. Moseley, Hallgarten, Estabrook & Weeden v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988) (quoting E.I DuPont de Nemours v. Grasselli Employees Indep. Assoc. of East Chicago, Inc., 790 F.2d 611, 614 (7th Cir. 1986)).

136. *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924) ("An arbitration agreement is placed upon the same footing as other contracts, where it belongs."); Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 701 (2d Cir. 1978).

all, "'[i]t is the arbitrator's construction which was bargained for,' and not that of the courts."[137]

B. The Functionality Argument

As the law currently stands, those grounds recognized by some of the circuits as exceptions to the Federal Arbitration Act provisions for vacation do not work well. Because arbitrators are not required to make formal findings of fact,[138] and are generally under no obligation to explain the rationale for the award,[139] there is usually no basis upon which a court may determine whether the arbitrators have manifestly disregarded the law or merely misinterpreted it.[140]

Clearly, if the courts were to insist upon an explanation for every arbitral award, their ability to justify vacating the awards based upon "manifest disregard" of the law would be improved.[141] However, requiring that written opinions accompany commercial arbitral awards defeats several of the reasons parties choose to arbitrate in the first place.[142] The Second Circuit, before endorsing the "manifest disregard" of the law standard in *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*,[143] commented that "[t]he sacrifice that arbitration entails in terms of legal

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137. Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 165 (D.C. Cir. 1981) (quoting United States Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)).

138. *See, e.g.*, Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6, 8 (1st Cir. 1989).

139. *See, e.g.*, Robbins v. Day, 954 F.2d 679, 684 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992); National R.R. Passenger Corp. v. Chesapeake and Ohio Ry. Co., 551 F.2d 136, 143 n.9 (7th Cir. 1977).

140. *National R.R. Passenger Corp.*, 551 F.2d at 143 n.9 (7th Cir. 1977). *See also* Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 656 (1985) (In J. Stevens' dissent, he mentions: "the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewable."); O.R. Securities v. Professional Planning Assoc., 857 F.2d 742 (11th Cir. 1988) ("If a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it. We recognize that this would be extremely difficult where the arbitrators failed to state the reasons for their decision." *Id.* at 747. "This problem is, perhaps, a strong argument in support of not recognizing manifest disregard of the law as a basis for vacating an arbitration award, but it does not affect our disposition of this case." *Id.* at n.4.).

141. *See* Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990); Sobel v. Hertz Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972).

142. *Id. See generally* Stipanowich, *supra* note 9.

143. 808 F.2d 930, 933 (2d Cir. 1986).

precision is recognized, and is implicitly accepted in the initial assumption that certain disputes are arbitrable. Given that acceptance, the primary consideration for the courts must be that the system operate expeditiously as well as fairly."[144]

This is not to say that written opinions accompanying arbitration awards should be beyond the power of the parties' request. An American Arbitration Association Rule allows variance of arbitration procedures by written agreement of the parties to the arbitration.[145] This rule, therefore, permits written opinions when requested by the parties.[146] Instead of merely allowing the parties to request written opinions, the American Arbitration Association Rules might better serve commercial users if procedures were firmly established affording the parties written opinions when desired.[147] Then, if the parties mutually agree that a reasoned written opinion is necessary, they could more easily contract to have one provided.

Arbitration is steadily becoming more similar to the litigation system many hoped it would replace.[148] In order for the arbitration process to continue to provide the benefits that parties seek when they agree to arbitration, written opinions must remain merely an option chosen by parties who have carefully considered the implications a written opinion will likely have on their ability to have the arbitration award vacated in the federal courts.

VIII. The Future of the "Manifest Disregard" of the Law Standard

A. The Current State of Affairs

Today, parties contemplating whether to contract for settlement of disputes by arbitration, and those parties considering how their existing disputes can be efficiently resolved, do not, and cannot know what

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144. *Sobel*, 469 F.2d at 1214 (citations omitted).

145. American Arbitration Association Commercial Arbitration Rules, Rule 1 (Jan. 1, 1990).

146. *See* Stipanowich, *supra* note 9, at 469.

147. *See Id.*

148. *See* Stewart, *supra* note 19, at 349; American Almond Prod. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944). The Securities Exchange Commission recently approved rule changes to NYSE Rule 627, AMEX Rule 614, and NASD Section 37. The amended rules provide that arbitration awards shall contain the names of the parties, a summary of the issues resolved, the relief requested, and the names of the arbitrators. Written opinions may be voluntarily prepared. *See* Exchange Act Release No. 26,805 (May 10, 1989) [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶ 84,414. It appears that the SEC is moving toward requiring written opinions. For an insider's comments on the rule amendments, see Stewart, *supra* note 19.

grounds may justify vacating an arbitration award in federal court.[149] The various circuits are so divergent on what grounds are sufficient to vacate an arbitral award that the law is essentially in a state of confusion.[150] Because parties involved in the arbitration process do not know what will justify vacation of arbitral awards, the courts are forced to review many motions to vacate which border upon being frivolous. However, the federal courts cannot normally sanction the responsible attorneys because the law on this subject is so unclear.

The United States Supreme Court must soon decide whether "manifest disregard" of the law is an additional ground for vacating commercial arbitration awards, independent of the Federal Arbitration Act, or whether "manifest disregard" merely describes 9 U.S.C. § 10(a)(4). Without guidance from the Court, the law in the circuits will remain hopelessly confused and inconsistent.[151]

Should the Court conclude that "manifest disregard" of the law is an additional ground for vacating commercial arbitration agreements, independent of the Federal Arbitration Act provisions, the Court must define the standard narrowly and clearly so that it will be understandable and useable. Unless narrowly construed, the underlying purposes of the Federal Arbitration Act—enforcing agreements to arbitrate, and speedy and cost-efficient resolution of disputes—will be frustrated.[152]

A well-defined standard will permit parties contemplating whether to provide for arbitration of their disputes to make an informed decision. The commercial public must realize that they get what they bargain for, and if they opt to resolve disputes through arbitration, they are not merely substituting one method of litigation for another.[153] These parties must know up-front what grounds are available for vacating arbitration awards in order for the commercial arbitration process to serve its

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149. *See generally* Stipanowich, *supra* note 9, at 469.

150. *See supra* Parts IV and V.

151. Uniformity of laws throughout the states has historically been a significant concern of the Supreme Court. In the landmark case, Martin v. Hunter's Lessee, 14 U.S. 304 (1816), wherein the Supreme Court's appellate authority over state tribunals was established, Justice Story said: "Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself: if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws and treaties and the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation or efficiency, in any two states." *Id.* at 348.

152. *See, e.g.*, Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967).

153. Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986).

intended purpose.[154] Also, a Supreme Court decision narrowly and clearly defining the "manifest disregard" of the law standard, would eliminate much of the needless litigation concerning what grounds are sufficient to vacate a commercial arbitral award.

Although a narrowly and clearly defined standard would be an improvement as compared to the current state of confusion, the commercial public, and the United States in general, would be best served by a Supreme Court opinion declaring the Federal Arbitration Act provisions to be the exclusive grounds for vacating commercial arbitration awards.[155] This view has been expressed by the courts on occasion. More than a decade ago, the Court of Appeals for the District of Columbia asserted that

> [w]here the parties have selected arbitration as a means of dispute resolution, they presumably have done so in recognition of the speed and inexpensiveness of the arbitral process; federal courts ill serve these aims and that of facilitation of commercial intercourse by engaging in any more rigorous review than is necessary to ensure compliance with statutory standards. It is particularly necessary to accord the "narrowest of readings" to the excess-of-authority provision of section [10(a)(4)].[156]

After all, the Federal Arbitration Act was never intended to establish arbitration as the equivalent of litigation. A party opting for arbitration cannot expect the best of both worlds. When a party agrees to arbitration, that party gains the benefits of arbitration, but sacrifices some of the benefits of adjudication, such as the appellate process.

For the arbitration process to survive and fulfill the hopes that Congress and the federal judiciary have invested in it, parties must realize that arbitration is substantially different from the litigation process. Judge Learned Hand expressed this almost fifty years ago when, speaking of parties to arbitration, he said "[t]hey must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery."[157] When parties agree to submit a dispute to the arbitral process, they must also

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154. *See generally*, Kanowitz, *supra* note 22, at 303 ("[I]t is important that the dangers and countervailing considerations surrounding these devices [of alternative dispute resolution] be calculated before resorting to them.").

155. 9 U.S.C. § 10 (Supp. III 1991).

156. Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 164-65 (D.C. Cir. 1981) (quoting Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 703 (2d Cir. 1978)).

157. American Almond Prod. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944).

realize that in doing so they agree to accept the uncertainties implicit in the arbitral process.[158]

B. What about Justice?

Some advocates for broader appealability of commercial arbitration awards may contend that the goal of the litigation process is to learn the truth, and therefore, that the federal courts should open their doors to appeals from arbitration awards based upon a theory of "manifest disregard" of the law.[159] However, it must be noted that the purpose of the Federal Arbitration Act was not to find truth, but to enforce agreements to arbitrate.[160] No one will deny that the search for truth and justice should be a goal of arbitration. However, this search should be facilitated through the arbitration process itself, rather than by expanding the grounds for vacating arbitration awards.

Opening the courts to the problems which arise in arbitration is no solution. The onus must be upon the American Arbitration Association, the various industry associations, and others with an interest in the success of arbitration to improve the arbitration system itself, to ensure it serves the purpose for which people use it—namely, speedy and cost-efficient resolution of conflict.

The impact of improving the arbitration process from within, rather than by expanding the grounds for vacating arbitration awards, will be substantial. Not only will fewer motions to vacate be brought to the federal courts, but arbitration as an alternative to litigation will be more desirable, as well as truly final. Most importantly, the parties to the arbitration process will know what they can expect from the arbitration process and from the federal courts.

IX. Conclusion

In an effort to ease the overcrowding of federal court dockets, judges, legal commentators, and practitioners have zealously recommended that the commercial public use alternative dispute resolution, and especially, arbitration. Frequently, due to the modern day bent for

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158. Raiford v. Merrill Lynch, Pierce, Fenner & Smith, 903 F.2d 1410, 1413 (11th Cir. 1990).

159. *See generally* Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 Tul L. Rev. 1, 34 (1987) ("Quality dispute resolution needs procedures that facilitate 'accurate' results. The determination of 'certain' or 'true' results is central to adjudication results and processes.").

160. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate.").

arbitration, parties agree to arbitrate commercial disputes without first considering the drawbacks. These parties must recognize that the arbitral process was not intended to be the equivalent of litigation, but instead, is an alternative system which offers the significant benefits of speed and cost efficiency. A necessary drawback of arbitration is that the decision of the arbitrators must be final, subject to the few exceptions set forth in the Federal Arbitration Act. Although the federal court circuits presently disagree whether the grounds for vacation of commercial arbitral awards provided by the Federal Arbitration Act are exclusive, the Supreme Court must eventually so hold in order to ensure that the arbitral process does not become merely a preliminary step to litigation.

This Note is not intended to cast a shadow upon the arbitration process. Instead, it is intended to make parties aware that arbitration is not the same as litigation and that the federal courts cannot offer the same scope of review as is available in adjudication. Parties contemplating whether to use arbitration must carefully consider the advantages and drawbacks to the arbitration process before agreeing to resolve their disputes in this manner. Unquestionably, the decision to forego the federal adjudicatory process in favor of arbitrating potential or pending disputes is not appropriate in all situations.